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A DIGEST OF INDIAN LAW CASES

CONTAINING

HIGH COURT REPORTS

AND

PRIVY COUNCIL REPORTS OF APPEALS FROM INDIA, 1914,

WITH AN INDEX OF CASES,

BEING A SUPPLEMENT TO THE CONSOLIDATED DIGEST OF INDIAN LAW CASES, 1836—1909.

COMPILED UNDER THE ORDERS OF THE GOVERNMENT OF INDIA

BY

B. D. BOSE

OF THE INNER TEMPLE, BARRISTER-AT-LAW ADVOCATE OF THE HIGH COURT, CALCUTTA, AND EDITOR OF THE INDIAN LAW REPORTS, CALCUTTA SERIES.

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PREFACE.

THIS Volume is published as a supplement to the new Consolidated Digest, 1836—1909. It contains the cases reported in the four Series of the Indian Law Reports for 1914, and the Law Reports, Indian Appeals, and the Calcutta Weekly Notes for the year 1913-14.

The different sets of Law Reports in which the same cases have been reported, are specifically noted in the "Table of Cases" published with the Volume.

For easy reference, several words and phrases, which are expounded in the judgments digested in this volume, are given in a separate list arranged in alphabetical order, under the heading "Words and Phrases."

B. D. BOSE.

HIGH COURT, CALCUTTA:
The 4th August, 1915.

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THE HIGH COURT, CALCUTTA, 1914.

CHIEF JUSTICE:

The Hon'ble Sir Lawrence H. Jenkins, Kt., K.C.I.E.

PUISNE JUDGES:

The Hon'ble Sir Harry L. Stephen, Kt. (*retired Nov. 15, 1914*).
" " J. G. Woodroffe.
" " Sir Asutosh Mookerjee, Kt., C.S.I.
" " H. Holmwood.
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" " D. Chatterjee.
" " N. R. Chatterjea.
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" " T. W. Richardson.
" " A. Chaudhuri.
" " S. Hasan Imam.
" " C. P. Beachcroft (*Additional*).
" " E. P. Chapman (*Additional*).
" " B. K. Mullick (*Additional*).
" " E. Greaves (*Additional*).
" " H. Walmsley (*Offg.*).

The Hon'ble G. H. B. Kenrick, K.C., *Advocate-General.*
" " B. C. Mitter, *Standing Counsel.*

THE HIGH COURT, BOMBAY, 1914.

CHIEF JUSTICE:

The Hon'ble Sir Basil Scott, Kt.
" " " Dinsha D. Davar, Kt. (*Acting*).

PUISNE JUDGES:

The Hon'ble Sir S. L. Batchelor, Kt.
" " " Dinsha D. Davar, Kt.
" " F. C. O. Beaman.
" " J. J. Heato .
" " N. C. Macleod.
" " L. A. Shah.
" " M. H. W. Hayward (*Acting*).

The Hon'ble T. J. Strangman, *Advocate-General.*
" " M. R. Jardine (*Acting*).
Mr. P. E. Percival, *Legal Remembrancer.*

THE HIGH COURT, MADRAS, 1914.

CHIEF JUSTICE:

The Hon'ble Sir Charles Arnold White, Kt. (*retired Oct. 12, 1914*).
" " " John E. P. Wallis, Kt.

PUISNE JUDGES:

The Hon'ble Sir John E. P. Wallis, Kt.
" " " Leslie C. Miller (*retired July 20, 1914*).
" " " Chittoor Sankaran Nair, Kt., C.I.E.
" " Abdur Rahim.
" " W. B. Ayling.
" " F. DuPre Oldfield.
" " C. G. Spencer.
" " T. Sadasiva Ayyar, *Diwan Bahadur.*
" " F. H. Badruddin Tyabji (*Offg.*).
" " C. F. Napier (*Offg.*).

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" " T. V. Seshagiri Ayyar.
" " C. V. Kumara Swami Sastriyar, *Diwan Bahadur.*
" " A. L. Hannay.

ADVOCATE GENERAL:

The Hon'ble F. H. M. Corbet.

THE HIGH COURT, ALLAHABAD, 1914.

CHIEF JUSTICE:

The Hon'ble Sir Henry G. Richards, Kt., K.C.

PUISNE JUDGES:

The Hon'ble Sir George E. Knox, Kt.
" " " Pramadacharan Banerji, Kt.
" " " Henry D. Griffin, Kt.
" " W. Tudball.
" " E. M. Des C. Chamier.
" " Saiyid Muhammad Rafiq.
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OF

THE HIGH COURT REPORTS

AND OF

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——————— Commission—"Assets come into his hands," meaning of—Pledge—Action for account—Estoppel—Evidence Act (I of 1872), s. 11—Acquiescence—Laches—Partition. Where part of the estate of which the defendant was appointed administrator *pendente lite* consisted of Government promissory notes, which had been pledged with ceratin Banks as security against advances, and these Government promissory notes were subsequently sold by the Banks under instructions from the defendant, and the sale-proceeds applied towards satisfying the indebtedness to the Banks, and the surplus money paid to the defendant: *Held*, that the defendant under the order of his appointment which provided for his remuneration by the allowance of "a commission of 2 per cent. on the assets that will come into his hands" was not entitled to charge commission on the gross value of the Government promissory notes, but only on the surplus moneys which he actually received after the indebtedness to the Banks had been satisfied. *Scott* v. *Franklin, 15 East 428*, referred to. Where an administrator *pendente lite* had retained as his remuneration more than he was entitled to claim, and his accounts showing such amounts had been passed by the Court with the knowledge of the plaintiffs and without any objection being taken by them, and a suit was subsequently brought by the plaintiffs to recover from him such excess, within the time allowed by law: *Held*, that such suit was not barred by estoppel, acquiescence or laches. *Redgrave* v. *Hurd, L. R. 20 Ch. D. 1*, referred to. The part of the estate to which the administrator *pendente lite* was appointed, was the undivided share of one out of four brothers in a joint family estate, the mother being alive, and subsequently by a decree in a partition suit, the mother was held entitled to a one-fifth share: *Held*, that the administrator *pendente lite* was entitled to charge his commission as on a one-fourth share. OSMOND BEEBY *v.* KHITISH CHANDRA ACHARJYA CHOWDHURY (1914)
I. L. R. 41 Calc. 771

ADMISSIBILITY.

See CONSTRUCTION OF DOCUMENT.
I. L. R. 37 Mad. 480

ADMISSION.

See CONTEMPT OF COURT.
I. L. R. 41 Calc. 173

ADMISSIONS AND CONFESSIONS TO POLICE OFFICERS.

——————— Statements by accused pointing out places of crime by others and of his subsequent concealment, and houses visited for help—Exculpatory statements as to the occurrence—Admission of blood stains on clothes worn by the accused—Admissibility of such statements—Useful test of admissibility of statements to the police—Admissibility of previous deposition when witness cannot be found—Sufficiency of evidence that he could not be found—Evidence Act (I of 1872),

ADMISSIONS AND CONFESSIONS TO POLICE OFFICERS—*contd.*

ss. 25 and 33—Circumstantial evidence, rule of. Section 25 of the Evidence Act does not exclude all statements by an accused to the police but only confessions. There is a distinction between mere admissions and confessions which are statements either directly admitting guilt or suggesting the inference of guilt of the crime charged. The general rule in the section is further subject to that which admits statements leading to discovery whether they amount to confessions or not. Statements by an accused to police officers pointing out the places where the offence was committed by others or where he concealed himself thereafter, and the houses to which he went for assistance, whether regarded as information leading to discovery, or as statements made by him as part of his defence, are admissible in evidence as admissions. Exculpatory statements by an accused to the police as to what, according to his case, actually happened on the occasion of the commssion of the offence and put forward by way of defence, are admissible as admissions, notwithstanding that they are shown by other evidence to be untruthful. So where the accused told the police that certain other persons had killed the deceased, described the occurrence, and stated that he was seized by them but escaped and concealed himself in a paddy field, that he went to the houses of several people for assistance against the murders but was turned away as a mad man, and that he then went and slept at the house of another person: *Held*, that the statements were admissible in evidence. A useful test as to the admissibility of statements made to the police is to ascertain the purpose to which they are put by the prosecution. If the prosecution relies on the statements as true they may, and probably in many cases will be found to, amount to confessions. If they are relied on not because of their truth but of their falsity and as a circumstance thereby tending to prove the guilt of the accused, they are admissible as admissions. But a statement by the accused to the police that a mark found in the *dhoti*, which he was wearing at the time of the occurrence, was a blood stain, was *held*, under the circumstances (*viz.*, the distance he was from the place of the murder and his prevarication as to the nature of the mark), to be of an incriminating character from which an inference might possibly, though not necessarily, be drawn. Where the only evidence that a witness could not be found was the statement of a police officer that search had been made for him to summon him but he could not be found, that a warrant was also issued and that he was a man of another district, but no warrant was produced and there was no evidence of any attempt to serve it, or, if so, of what was done for the purpose: *Held*, that sufficient ground had not been established for the admission of the previous deposition of the witness under s. 33 of the Evidence Act. To justify the inference of guilt from circumstances, the inculpating facts must be

ADMISSIONS AND CONFESSIONS TO POLICE OFFICERS—*concld.*

shown to be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis than that of guilt. EMPEROR *v.* KANGAL MALL (1905)
I. L. R. 41 Calc. 601

ADOPTION.

See HINDU LAW—ADOPTION.

See HINDU LAW—IMPARTIBLE ESTATE.
I. L. R. 37 Mad. 199

ADVANCEMENT.

——— **presumption of—**

See MARRIED WOMEN'S PROPERTY ACT (III OF 1874), S. 6.
I. L. R. 37 Mad. 483

ADVERSE POSSESSION.

See DISTRICT MUNICIPAL ACT (BOM. ACT III OF 1901), SS. 113, 122.
I. L. R. 38 Bom. 15

See ENCROACHMENT.
I. L. R. 38 Bom. 15

——— **by mortgagee—**

See TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 54, 118.
I. L. R. 37 Mad. 423

——— **tacking of—**

See EVIDENCE ACT (I OF 1872), SS. 107, 108 . . **I. L. R. 37 Mad. 440**

1. ——— *Lease of land by an agent of landlord—Collection of rent by the agent—Agent paying over the rent to the landlord—Agent setting up his own title and keeping the rent to himself during continuance of lease—Landlord's right to land at determination of tenancy.* In 1887 certain land belonging to defendant No. 2's family was leased to a tenant for 18 years by a registered lease by the plaintiff's family, who acted as agents of the defendant No. 2's family, and collected the rent and paid it over to them. The rent was so paid till 1893, when the plaintiff's family set up their own title to the land and ceased paying over the rent to the defendant No. 2. The tenant remained in possession of the land till the determination of the tenancy in 1905; and then attorned to defendant No. 2. In 1908, the plaintiff sued to recover possession of the land, alleging that the title of defendant No. 2 to the land was lost by the adverse possession of the plaintiff. The lower Courts decreed their claim. On appeal by defendant No. 2: *Held*, reversing the decree, that so long as the tenant held the land under the tenancy he held it as the tenant of defendant No. 2's family and their rights were just as good at the end of the tenancy as they were at the beginning, and were absolutely unaffected in any particular by the reiterated assertions made by the plaintiff of an adverse title or by the fact

ADVERSE POSSESSION—*contd.*

that the rents were retained by the plaintiff. KRISHNADIXIT *v.* BALDIXIT VAMANDIXIT (1913)
I. L. R. 38 Bom. 53

2. ——— *Absence of intention to acquire absolute interest—Limitation.* In a suit to recover possession by an adopted son against the lessees of the deceased adoptive mother who was in possession, where the plaintiff believed that the adoptive mother was entitled to remain in possession for life and she shared that belief and so remained in possession while the plaintiff took no steps to disturb her: *Held*, that the plea of adverse possession by the adoptive mother could not arise, there being no intention to hold adversely so as to acquire an absolute estate. PIRSAB VALAD KASIMSAB *v.* GURAPPA BASAPPA (1913) . . **I. L. R. 38 Bom. 227**

3. ——— *Possession by person claiming as trustee—Animus possidendi determines nature of right prescribed—Estoppel—Landlord and tenant.* When a person purports to hold property as a trustee, he cannot by such possession acquire a right to the property by prescription for himself against the beneficiaries. The character in which possession is held, and the *animus possidendi* of the holder determines the right which the possession would confer. *Madhava v. Narayana, I. L. R. 9 Mad. 224, Thakore Fatesingji v. Bamanji A. Dalal, I. L. R. 27 Bom. 515, Secretary of State for India v. Krishnamoni Gupta, I. L. R. 29 Calc. 518, Lyell v. Kennedy, L. R. 14 A. C. 437*, and *Soar v. Ashwell*, [*1893*] *2 Q. B. 390*, referred to. The plaintiff's father claiming to be the trustee of a temple demised temple lands in 1866 on kanom to the first defendant, and the second defendant was the ultimate assignee of the kanom interest at the date of suit. The plaintiff's claim to the trusteeship was negatived by decree of Court in 1894 when a third party was declared to be the trustee. It was found that the plaintiff was not the trustee at the date of the present suit instituted by the plaintiff for recovery of possession of the kanom lands from the second defendant: *Held*, that the suit must fail, as the plaintiff was not the trustee. *Held*, further, that the second defendant was not estopped from denying the plaintiff's right on the ground that he was no longer the trustee, though he would be estopped from denying the title of the temple. THUPPAN NAMBUDRIPAD *v.* ITTICHIRI AMMA (1914)
I. L. R. 37 Mad. 373

4. ——— *Mortgagor and mortgagee—Validity of agreement that the mortgagee's possession should be as absolute owner after a certain date.* Where a mortgage deed provided that in default of payment of the mortgage amount within the stipulated period, the mortgagee should take possession of the mortgaged property and enjoy the same as absolute owner, and accordingly the mortgagor after the said period, and in consideration of a further payment of Rs. 250 by the mortgagee, relinquished the mortgaged property to be held by

ADVERSE POSSESSION—*concld.*

the mortgagee as absolute owner, and had the patta transferred to his name; *Held*, that the possession of the mortgagee under the circumstances for over twelve years, was adverse to the mortgagor, whose right to redeem consequently became barred by limitation. An unregistered agreement between the mortgagor and the mortgagee, that the mortgagee shall hold possession as owner will not confer an immediate title on the mortgagee, but is valid in so far as it has the effect of changing the legal character of the possession of a mortgagee into possession as owner. A mortgagee cannot by a mere assertion of his own or by any unilateral act on his part, convert his possession as mortgagee into possession as absolute owner. *Ali Muhammad v. Lalta Buksh, I. L. R. 1. All. 655*, referred to. *Kurri Veerareddi v. Kurri Bapireddi, I. L. R. 29 Mad. 336, Sri Raja Papamma Rao v. Sri Vira Pratapa H. V. Ramachandra Razu, I. L. R. 19 Mad. 249*, and *Dasharatha v. Nyahalchand, I. L. R. 16 Bom. 134*, distinguished. USMAN KHAN *v.* DASANNA (1914) **I. L. R. 37 Mad. 545**

5. _____ *of holders of portions of estate, effect of, on purchaser of estate at revenue sale.* On the failure of an owner to pay the Government assessment, his estate or interest in the land is forfeited or rather determined and the purchaser at a Revenue sale purchases not the interest of the defaulting owner but that of the Crown, subject to the payment of the Government assessment, and as against a person who claims title to any portion of the estate by adverse possession, the time limited by the Limitation Act commences to run from the date of the sale. SURJA KANTA ACHARJYA *v.* SARAT CHANDRA ROY CHOWDHURY (1914) **18 C. W. N. 1281**

ADVOCATE.

———— duty of—

See DEFAMATION . **I. L. R. 41 Calc. 514**

ADVOCATE-GENERAL.

———— consent of—

See PUBLIC RELIGIOUS TRUST.
I. L. R. 41 Calc. 749

AFFIDAVIT.

See CRIMINAL PROCEDURE CODE, ss. 244, 540.
I. L. R. 36 All. 13

AGENT.

See ADVERSE POSSESSION.
I. L. R. 38 Bom. 53

See COMPANIES ACT (VI OF 1882), ss. 76, 77 . . **I. L. R. 36 All. 416**

———— negligence of—

See CARRIERS . **I. L. R. 41 Calc. 80**

AGRA TENANCY ACT (II OF 1901).

———— s. 10—*Exproprietary tenant—Contract to pay a higher rate of rent than that prescribed by law, invalid. Held*, that a proprietor who becomes, by the operation of section 10 of the Agra Tenancy Act, 1901, an exproprietary tenant cannot enter into a valid agreement to pay rent for his exproprietary holding at a higher rate than that prescribed by the section. PRAG *v.* SITAL PRASAD (1914) . . **I. L. R. 36 All. 155**

s. 32—

See CIVIL PROCEDURE CODE, O. XX. r. 18 . . **I. L. R. 36 All. 461**

———— ss. 95, 167; Sch. IV, group C, No. 34—*Jurisdiction—Civil and Revenue Courts—Occupancy holding—Succession.* On the death of an occupancy tenant, a person alleging herself to be his widow applied in the Revenue Court for mutation of names in her favour. This application was resisted by the zamindars, who denied that the applicant was legally the wife of the deceased tenant. The Revenue Court rejected the application for mutation, and the applicant thereupon filed her suit in the Civil Court asking for a declaration that she had been legally married to the deceased tenant and was the rightful heir to his estate, *viz.*, occupancy holding. No other property of the deceased was specified: *Held*, that in the circumstances the relief claimed fell within the purview of section 95 of the Agra Tenancy Act, 1901, and that the suit was not cognizable by a Civil Court. *Birham Khushal* v. *Sumera, I. L. R. 35 All. 229*, referred to. RAM CHARITRA RAI *v.* JINSI AHIRIN (1913) **I. L. R. 36 All. 48.**

———— s. 167; Sch. IV, group C, No. 30—*Civil and Revenue Courts—Jurisdiction—Suit by reversionary heir on death of Hindu to recover a holding.* The widow and son's widow of a separated Hindu, being in possession as such of a fixed rate holding which had belonged to their late husband and father-in-law, sold the same to a *mahajan*, who in turn sold it to the zamindar: *Held*, on suit brought by the reversionary heir of the late tenant some three years after the last widow's death for recovery of possession of the holding, (i) that the suit was of the nature contemplated by section 167 and Schedule IV, Group C, No. 30, of the Agra Tenancy Act, 1901, and would not lie in a Civil Court; and (ii) that the suit was therefore barred by limitation. *Ram Lal* v. *Chunni Lal*, 2 All. L. J. 69, referred to. BADRI KASAUNDHAN *v.* SARJU MISR (1913) **I. L. R. 36 All. 55**

———— s. 177 (e)—*Suit for ejectment in Revenue Court—Defendant pleading possession as proprietor—Question of proprietary title—Appeal.* The plaintiff sued in a Revenue Court to eject the defendant on the allegation that he (the plaintiff) was the occupancy tenant of the plot in question and the defendant was his sub-tenant. The defendant pleaded that he was in possession not as a sub-tenant of the plaintiff but as a proprietor, and that the plot was his *khud-kasht*

AGRA TENANCY ACT (II OF 1901)—*concld.*

——— **s. 177**—*concld.*

Held, that on these pleadings a question of proprietary title was in issue in the case within the meaning of section 177 (*c*) of the Agra Tenancy Act, 1901, and that an appeal lay to the District Judge and not the Commissioner. *Dal Chand* v. *Shamla, 2 All. L. J. 176*, referred to. *Udit Tiwari* v. *Bihari Pande*, I. L. R. 35 All. 521, overruled. BINDESHRI PANDE *v.* GOKUL (1914)
I. L. R. 36 All. 183

——— **s. 194**—*Lambardar—Right of lambardar to eject tenants—Suit in ejectment—Other co-sharers not necessary parties. Held*, that when a lambardar in a lambardari village sues to eject a tenant he is not bound to join the other co-shares as parties. *Semble:* That section 194 of the Tenancy Act was not intended to apply to the case of a lambardari village. *Bishambhar Nath* v. *Bhullo, I. L. R. 34 All. 98*, distinguished. GULZARI MAL *v.* JAI RAM (1914)
I. L. R. 36 All. 441

AGREEMENT.

See ADVERSE POSSESSION.
I. L. R. 37 Mad. 545

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), S. 257A.
I. L. R. 38 Bom. 219

See CONTRACT ACT (IX OF 1872), S. 28.
I. L. R. 38 Bom. 344

See CONTRACT ACT (IX OF 1872), S. 65.
I. L. R. 38 Bom. 249

——— **memorandum of—**

See STAMP ACT (II OF 1899), S. 2 (*14*), SCH. I, ART. 5 . **I. L. R. 36 All. 11**

1. ——— *interfering with the course of legal proceedings—Agreement that suit should be decided in accordance with the result of another suit, whether a bar to its trial on the merits—Compromise.* An agreement by a party that a suit may be decided in a manner different from that prescribed by law is void and does not debar him from subsequently claiming a trial of the suit on its merits. *Rukhanbhai* v. *Adamji, I. L. R. 33 Bom. 69*, and *Moyan* v. *Pathukutti, I. L. R. 31 Mad. 1*, referred to. Pending an original suit in the Court of a District Munsif, by the maker of a promissory note, for a declaration that it was unenforceable, the payee instituted a suit on the promissory note for recovery of the amount due, in the Small Cause Court. The parties agreed that the small cause suit should be decided in accordance with the result of the original suit, and the former suit was finally dismissed without a trial, following the decision of the Munsif in the original suit: *Held*, that the agreement in question did not disentitle the plaintiff from claiming a trial of the small cause suit independently on its merits, and the suit must consequently be remanded. Subject to certain well-known exceptions, when the Court is seised of a case, it has jurisdiction to decide it in the manner prescribed by law, and that the parties have no right to interfere with its authority to do so. RAJA OF VENKATAGIRI *v.* CHINTA REDDY (1914)
I. L. R. 37 Mad. 408

AGREEMENT—*concld.*

2. ——— *Agreement for purchase and sale of immoveable property—Condition for return of earnest money, on non-approval of title by purchaser's solicitor—Non-approval must be reasonable and not mala fide—Title, approval or rejection, condition as to, in agreement of sale.* Where an agreement for purchase and sale contained a condition for the return of the earnest money on the vendor's title not being approved by the purchaser's solicitor and the solicitor disapproved of the title on the ground amongst others that one of the former owners had mortgaged the property pending a partition suit at which the property was sold by auction under directions of Court, and purchased by the present vendor's predecessor in title for value and the vendor was unable to furnish any information regarding the mortgage but urged that it was inoperative and that his title being derived from a purchaser without notice was not open to objection: *Held*, that it cannot be said that the solicitor was unreasonable in refusing to accept the title inasmuch as he cannot be expected to go into any question of evidence as to whether the purchase was without notice or not; and, further, there being nothing to show that he acted in bad faith or was unreasonable in advising his client to reject the title, the intending purchaser was entitled to get back from the vendor the earnest money and his solicitor's costs for investigation of title as was stipulated for in the contract. ABRO *v.* PROMOTHO NATH MUKERJEE (1914) . **18 C. W. N. 568**

AGRICULTURAL TRIBE.

See BUNDELKHAND ALIENATION OF LAND ACT (II OF 1903), S. 9.
I. L. R. 36 All. 376

AGRICULTURIST.

See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), SS. 2 (*2*), 10A.
I. L. R. 38 Bom. 18

ALIENATION.

See BHAGDARI ACT (BOM. ACT V OF 1862), S. 3 . **I. L. R. 38 Bom. 679**

See HINDU LAW—ALIENATION.

See HINDU LAW—STRIDHAN.
I. L. R. 41 Calc. 870

See HINDU LAW—WIDOW.
I. L. R. 38 Bom. 224

See INAM LANDS.
I. L. R. 38 Bom. 272

——— **in part, by managing member for necessity—**

See HINDU LAW—JOINT FAMILY.
I. L. R. 37 Mad. 435

ALIENATION—*concld.*

———— in part, for necessity—

See HINDU LAW—WIDOW.
I. L. R. 37 Mad. 275

ALTERNATIVE CLAIMS.

See PRE-EMPTION.
I. L. R. 36 All. 476

AMARAM TENURE.

See MADRAS ESTATES LAND ACT (I OF 1908) . . **I. L. R. 37 Mad. 1**

AMENDING ACT.

———— retrospective effect of—

See LIMITATION . **I. L. R. 41 Calc. 1125**

AMENDMENT OF PLAINT.

———— *Limitation—Fresh relief claimed in respect of which a suit would have been time-barred.* A deed of mortgage purported in the first place to mortgage with possession certain specified plots of *sir* and *khudkasht* land. There was, however, a stipulation in the mortgage-deed that, if the mortgagees failed to obtain possession under the deed or were disturbed in their possession, they would be entitled to recover their money from the mortgagors, and this either by sale of the mortgaged plots, or by sale of the zamindari share to which these plots appertained or from the persons and the property of the judgment-debtors. A suit was filed just within the extended period of limitation allowed by section 31 of Act No. IX of 1908 for sale of the specified plots. After the period of limitation, however, had expired the plaintiffs applied for leave to amend the plaint and asked for sale of the zamindari share. The Court below allowed the amendment. *Held*, that the Court had no power to allow amendment of the plaint by introducing a new cause of action after the period of limitation in respect of such cause had expired. *Muhammad Sadiq* v. *Abdul Majid*, *I. L. R. 33 All. 616*, distinguished. BALKARAN UPADHYA *v.* GAYA DIN KALWAR (1914)
I. L. R. 36 All. 370

ANCESTRAL PROPERTY.

See EXECUTION OF DECREE.
I. L. R. 36 All. 33

See HINDU LAW—MAINTENANCE.
I. L. R. 37 Mad. 396

ANCIENT DOCUMENT.

See EVIDENCE ACT (I OF 1872), SS. 4, 90.
I. L. R. 37 Mad. 455

ANCIENT LIGHTS.

See EASEMENT . **L. R. 41 I. A. 180**

ANTECEDENT DEBT.

See HINDU LAW—JOINT FAMILY.
I. L. R. 36 All. 17

APPEAL.

See AGRA TENANCY ACT (II OF 1901), S. 177 (*e*) . . **I. L. R. 36 All. 183**

CIVIL PROCEDURE CODE (1908), SS. 96 AND 97 . **I. L. R. 36 All. 532**

See CIVIL PROCEDURE CODE (1908), S. 97 . . **I. L. R. 38 Bom. 331**

See CIVIL PROCEDURE CODE (1908), S. 104; O. XLIII, r. 10 (*a*).
I. L. R. 36 All. 58

See CIVIL PROCEDURE CODE (1908), SCH. II, ARTS. 15, 16; O. XXXII, r. 7.
I. L. R. 36 All. 69

See CIVIL PROCEDURE CODE (1908), O. XLI, r. 4 . **I. L. R. 36 All. 510**

See CIVIL PROCEDURE CODE (1908), O. XLI, r. 10 . **I. L. R. 36 All. 46**

See CIVIL PROCEDURE CODE (1908), O. XLI, r. 22 . **I. L. R. 36 All. 505**

See COURT FEES ACT (VII OF 1870), S. 7 (ix); SCH. I, ART. (1).
I. L. R. 36 All. 40

See CRIMINAL PROCEDURE CODE, S. 195 . . **I. L. R. 36 All. 469**

See CRIMINAL PROCEDURE CODE, SS. 367, 421 . . **I. L. R. 36 All. 496**

See PROVINCIAL INSOLVENCY ACT (III OF 1907), SS. 13 (*3*), 47.
I. L. R. 36 All. 65

See PROVINCIAL INSOLVENCY ACT (III OF 1907), SS. 20, 22, 46.
I. L. R. 36 All. 8

See PROVINCIAL INSOLVENCY ACT (III of 1907), SS. 43 AND 46.
I. L. R. 36 All. 576

See REVIEW . **I. L. R. 41 Calc. 746**

———— competency to prefer—

See PUBLIC PROSECUTOR.
I. L. R. 41 Calc. 425

———— dismissal of, for default—

See LIMITATION ACT (XV OF 1877), S. 4; SCH. II, ART. 179 (2).
I. L. R. 36 All. 284

———— dismissal of, for want of prosecution—

See PRIVY COUNCIL.
I. L. R. 36 All. 350

———— from preliminary decree—

See EVIDENCE ACT (I OF 1872), SS. 4, 90 . . **I. L. R. 37 Mad. 455**

———— from preliminary order—

See DECREE . **I. L. R. 37 Mad. 29**

———— subsequent filing of—

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XLVII, r. 1.
I. L. R. 38 Bom. 416

APPEAL—*contd.*

1. ——— *Attachment— Stay of execution—Security—Order accepting security, whether appealable—"Decree"—Civil Procedure Code (Act V of 1908), ss. 2 (2) and 47.* An order for security to stay execution is not an order determining any rights of the parties. It is neither an order under s. 47 nor is it a "decree" within the meaning of s. 2 (2) of the Code of Civil Procedure, 1908. It is, therefore, not appealable. *Deoki Nandan Singh* v. *Bansi Singh, 14 C. L. J. 35,* and *Srinibash Prasad Singh* v. *Kesho Prasad Singh, I. L. R. 38 Calc. 754; 14 C. L. J. 489,* referred to. SARASWATI BARMANIA *v.* GOLAP DAS BARMAN (1913)

I. L. R. 41 Calc. 160

2. ——— *"Jurisdiction"—Revision, power of—Civil Procedure Code (Act V of 1908), s. 115—Appeal from order of single Judge sitting on Original Side, made in exercise of revisional jurisdiction—Appellate jurisdiction of High Court—Letters Patent of 1865, cls. 15, 16, 39—"Judgment"—High Courts Act (24 & 25 Vic., c. 104), s. 13—Presidency Small Cause Courts Act (XV of 1882), ss. 6, 41.* An order made by a single Judge sitting on the Original Side under s. 115 of the Code of Civil Procedure, interfering with a judgment of the Presidency Small Cause Court, is a "judgment" within the meaning of s. 15 of the Letters Patent and is appealable. *Chappan* v. *Moidin Kutti, I. L. R. 22 Mad. 68,* followed. *Hiralal* v. *Bai Asi, I. L. R. 22 Bom. 891,* distinguished. *Girdharee Singh* v. *Hurdoy Narain Sahoo, 21 W. R. 263, Secretary of State for India* v. *British India Steam Navigation Co., 13 C. L. J. 90, Venkatta Reddi* v. *Taylor, I. L. R. 17 Mad. 100,* referred to. An application under s. 41 of the Presidency Small Cause Courts Act for the recovery of possession of certain immovable property, was refused by the Presidency Small Cause Court on the ground that the relationship of landlord and tenant had not been established: *Held,* that, assuming that the judgment was erroneous, the High Court was not justified in interfering under s. 115 of the Civil Procedure Code. *Amir Hassan Khan* v. *Sheo Baksh Singh, I. L. R. 11 Calc. 6,* followed, *Birj Mohan Thakur* v. *Rai Uma Nath Chowdhry, I. L. R. 20 Calc. 8,* and *Maharajah of Burdwan* v. *Apurba Krishna Roy, 15 C. W. N. 872,* distinguished. *Per* WOODROFFE, *J.*—The term "Jurisdiction" in s. 115 of the Code of Civil Procedure is used in the ordinary sense to mean a jurisdiction local, pecuniary, personal or with reference to the subject-matter of the suit. SHEW PROSAD BUNGSHIDHUR *v.* RAM CHANDRA HARIBUX (1913)

I. L. R. 41 Calc. 323

3. ——— *Admission of appeal only on a limited ground—Legality of such procedure—Right of appellant to be heard on all the grounds taken in the petition of appeal—Criminal Procedure Code (Act V of 1898), ss. 421, 422, 423—Examination of a child as a witness without affirmation—Intentional omission to affirm, effect of—Competency of a child-witness—Mode of testing its capacity—Necessity or advisability of preliminary inquiry—Oaths Act (X of 1873), ss. 5, 6 and 13—Evidence Act (I of 1872), s. 118.* When an appeal has been admitted, the appellant is entitled to be heard on the whole case, and cannot be restricted to any selected ground from those specified in his petition. A restrictive order of admission of an appeal is not contemplated by s. 422 of the Criminal Procedure Code and is *ultra vires. Lukhi Narain Serowji* v. *Sri Ram Chandra, 15 C. W. N. 921,* referred to. A child witness, though under seven years of age, must be examined on oath or affirmation under ss. 5 and 6 of the Oaths Act (X of 1873), and the Court has no power to refrain from dispensing with the same. *King* v. *Brasier, 1 Leach 237,* referred to. *Per* MOOKERJEE, *J.—Quœre:* Whether an intentional omission to comply with the provisions of ss. 5 and 6 of the Oaths Act is a defect cured by s. 13 thereof. *Queen* v. *Sewa Bhagta, 14 B. L. R. 294; 23 W. R. Cr. 12, Queen* v. *Mussamut Itwarya, 14 B. L. R. 4; 22 W. R. Cr. 14, Queen* v. *Annunto Chuckerbutty, 14 B. L. R. 295n; 22 W. R. Cr. 1, Nundo Lal Bose* v. *Nistarini Dassi, I. L. R. 27 Calc. 428, Queen-Empress* v. *Maru, I. L. R. 10 All. 207, Queen-Empress* v. *Lal Sahai, I. L. R. 11 All. 183, Queen-Empress* v. *Shava, I. L. R. 16 Bom. 359,* and *Queen-Empress* v. *Viraperumal, I. L. R. 16 Mad. 105,* referred to. The question of the capacity of a witness to testify is one for the Judge to decide and not for the jury, but when he has decided in favour of competency, it is for the latter to determine the weight of the evidence. *Queen* v. *Hosseinee 8 W. R. Cr. 60,* followed. *Per* BEACHCROFT, *J.*—The question whether a witness understands the nature and obligation of an oath or affirmation is foreign to the question of competency under s. 118 of the Evidence Act. Intellectual capacity is the only test. *Per* CURIAM: Under s. 118 of the Evidence Act the Court is not bound, before taking the deposition of a child witness, to ascertain by preliminary examination whether the child has capacity to understand the questions put to it and to give rational answers to them, but the competency of such witness may be tested during the course of its examination. *Sheikh Fakir* v. *Emperor, 11 C. W. N. 51,* dissented from. *Queen* v. *Whitehead, L. R. 1 C. C. R. 33,* referred to. *Wheeler* v. *United States, 159 U. S. 523,* approved. Where the Judge intentionally omitted to affirm certain children, aged 4 and 6 years, respectively, examined as witnesses, and had not considered whether they were, by reason of tender years, prevented from understanding the questions put to them and from giving rational answers, within the meaning of s. 118 of the Evidence Act, the conviction of accused was set aside and a retrial ordered. NAFAR SHEIKH *v.* EMPEROR (1913)

I. L. R. 41 Calc. 406

4. ——— *Mortgage decree—Representatives of Judgment-debtor—Transfer of Property Act (IV of 1882), ss. 52, 56, 81—*

APPEAL—*concld.*

Civil Procedure Code (Act V of 1908), ss. 2, 47, 151, and O. XXXIV, r. 5—Foreclosure—Sale—Exclusion of property. Where the petitioners, subsequent mortgagees (who had foreclosed a property which, it now transpired, was included in an earlier mortgage of several other properties to the present decree-holders, prior mortgagees) applied under s. 47 of the Code of Civil Procedure for the exclusion of the property from the present sale proceedings and got this order, and the judgment-debtor (mortgagor) appealed therefrom: *Held*, that the petitioners were the representatives of the judgment-debtor within the meaning of s. 47 of the Code of Civil Procedure and that this order could not be regarded merely as an order under rule 5 of Order XXXIV of the Code of Civil Procedure but amounted to a decree within the meaning of s. 2 of the Code and was therefore appealable. *Held*, further, that the Courts have power, in appropriate circumstances, to make such orders under ss. 56 and 81 of the Transfer of Property Act. *Ishan Chandra Sirkar* v. *Beni Madhab Sirkar, I. L. R. 24 Calc. 62*, relied on. *Kommineri Appayya* v. *Mangala Rangayya, I. L. R. 31 Mad. 419*, distinguished. TARA PRASANNA BOSE *v.* NILMANI KHAN (1913) . **I. L. R. 41 Calc. 418**

5. ———— *right of, when decree does not adversely affect appellant—Res judicata.* No appeal will lie from a decree which does not itself in some way or other adversely affect the appellant. The fact that in the judgment there is an adverse finding on a point not directly or substantially in issue between the parties will not give a party a right to contest such a finding where the decree is entirely in his favour and does not necessarily imply that finding. The finding would not act as *res judicata* as regards such point. *Quære:* Whether an appeal would lie even if the matter were *res judicata*? SECRETARY OF STATE *v.* SAMINATHA KOWNDEN (1914) . . . . **I. L. R. 37 Mad. 25**

APPEAL FROM ACQUITTAL.

See STATUTE 24 & 25 VICT., C. 104, SS. 1 and 2 . **I. L. R. 36 All. 168.**

APPEAL IN CRIMINAL CASES.

See PRIVY COUNCIL, PRACTICE OF.
I. L. R. 41 Calc. 1023

———— *Duty of Appellate Court.* Where it appeared from the judgment of the Sessions Judge in appeal that he practically called upon the appellants before him to establish to his satisfaction that the first Court had come to a wrong finding: *Held*, that this was not the standpoint from which an appeal in a criminal case was to be approached. In an appeal from a conviction and sentence it is for the Appellate Court, as for the first Court, to be satisfied affirmatively that the prosecution case is substantially true and that the guilt of the appellants has been established beyond all

APPEAL IN CRIMINAL CASES—*concld.*

reasonable doubt. KANCHAN MULLIK *v.* KING-EMPEROR (1914) . . **18 C. W. N. 1215**

APPEAL TO HIGH COURT.

See SPECIAL APPEAL.
I. L. R. 38 Bom. 340

APPEAL TO PRIVY COUNCIL.

See CIVIL PROCEDURE CODE (1908), SS. 109, 110; O. XLI, R. 10.
I. L. R. 36 All. 325

See PRIVY COUNCIL, LEAVE TO APPEAL TO.
I. L. R. 38 Bom. 421

———— ———— ———— *Review—Civil Procedure Code (Act V of 1908), O. XLVII—Letters Patent, 1865, cls. 10, 39—Sanction for prosecution—Criminal Procedure Code (Act V of 1898), s. 195.* An order sanctioning prosecution made in the course of a disciplinary proceeding against an attorney under cl. 10 of the Letters Patent of 1865, is not governed by cl. 39 and therefore against such an order no leave to appeal to the Privy Council can be given. Clause 39 of the Letters Patent empowers the High Court to declare the fitness of an appeal to the Privy Council in any matter, not being of criminal jurisdiction, if it is a final judgment, decree, or order of the Court, made on appeal or in the exercise of original jurisdiction. A proceeding under cl. 10 is a disciplinary power which does not fall under any of the jurisdictions specified in the Letters Patent, and thus is not governed by cl. 39. *In the matter of* AN ATTORNEY (1914) . . . . **I. L. R. 41 Calc. 734**

APPEARANCE.

See EX PARTE DECREE.
I. L. R. 41 Calc. 956

APPELLATE COURT.

See CIVIL PROCEDURE CODE (1908), O. XLI, R. 27 . **I. L. R. 38 Bom. 665**

See REMAND . **I. L. R. 41 Calc. 108**

———— **jurisdiction of, defined—**

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), S. 106.
I. L. R. 37 Mad. 153

———— **power of—**

See DACOITY . **I. L. R. 41 Calc. 35**

APPELLATE FORUM.

See JURISDICTION.
I. L. R. 37 Mad. 477

APPLICATION.

See SANCTION FOR PROSECUTION.
I. L. R. 41 Calc. 14

ARBITRATION.

See CIVIL PROCEDURE CODE (1908), SS. 115, 151 . **I. L. R. 38 Bom. 638**

ARBITRATION—*contd.*

See CIVIL PROCEDURE CODE (1908) SCH. II, CL. 11. **I. L. R. 38 Bom. 60**

See CIVIL PROCEDURE CODE (1908), SCH. II, ARTS. 15 AND 16, O. XXXII, R. 7 . . . **I. L. R. 36 All. 69**

See CIVIL PROCEDURE CODE (1908), O. XXIII, R. 3, SCH. II. **I. L. R. 38 Bom. 687**

——— **misconduct of**—

See CIVIL PROCEDURE CODE (1908), SCH. II, CL. 11. **I. L. R. 38 Bom. 60**

1. ——— *Arbitration Act (IX of 1899), s. 19—Contract by bought and sold notes—Arbitration clause—Contract Act (IX of 1872), ss. 62, 63.* Where an application under an arbitration clause in a contract was made to stay proceedings and refer matter in dispute to arbitration, and it was contended by the opposite party that for the original contract a new agreement had been substituted, inasmuch as both parties had agreed to an extension of time: *Held*, that a mere extension of time did not operate so as to rescind the original contract, but where a new term for the inspection of the goods before delivery had also been introduced, the original contract was replaced by the new agreement, to which the arbitration clause in the original contract could not apply, and the application must, therefore, be refused. In this case the acceptance of part-delivery out of time also indicated a new agreement between the parties. LACHMINARAIN BHAREODAN *v.* HOARE, MILLER & Co. (1913) . . . **I. L. R. 41 Calc. 35**

2. ——— *Legal misconduct of arbitrator—Award set aside—Remission of award—Arbitration Act (IX of 1899), ss. 13 and 14.* Where an award was set aside on the grounds of the legal (as distinguished from moral) misconduct of the arbitrator, and the indefiniteness of the award: *Held*, that the Court had the power to remit the award to the arbitrator for reconsideration. *Re Arbitration between Montgomery Jones & Co. and Liebenthal & Co., 78 L. T. 406*, and *Anning* v. *Hartley, 27 L. J. Exch. 145*, followed. *In re Keighley Maxsted & Co. and Bryan Durant & Co., [1893] 1 Q. B. 405*, referred to. CROMPTON & Co. LD. AND MOHAN LAL, *Re Arbitration between* (1913) . . **I. L. R. 41 Calc. 313**

3. ——— *Award—Misconduct of arbitrator—Application to file award and for a decree in accordance with it—Civil Procedure Code, 1908, sch. II, para. 14, 15, 20—Arbitrator as witness—Evidence of arbitrator where charges of dishonesty and partiality are made—Portion of award invalid, but separable—Arbitrator's notes. Held*, in this case, that an award which had been made in arbitration proceedings without the intervention of the Court, and in respect of which an application was made under paragraph 20 of the Civil Procedure Code, 1908, that the award should be filed in Court and a decree passed in accordance therewith, was not invalidated by anything done by the

ARBITRATION—*contd.*

arbitrator in the arbitration proceedings, his acts not amounting to corruption or misconduct within the meaning of paragraph 15 of schedule II of the Code. If irregularities can be proved which would amount to no proper hearing of the matters in dispute there would be misconduct sufficient to vitiate the award without any imputation on the honesty or impartiality of the arbitrator, but no such irregularities were established by the appellant, on whom the onus of proving them lay. An arbitrator selected by the parties comes within the general obligation of being bound to give evidence, and where a charge of dishonesty or partiality is made, any relevant evidence he can give is without doubt properly admissible. It is, however, necessary to take care that evidence admitted as relevant on a charge of dishonesty or partiality is not used for a different purpose, namely, to scrutinize the decision of the arbitrator on matters within his jurisdiction and in which his decision is final. The limitations applicable to the evidence of an arbitrator as witness in a legal proceeding to enforce his award are stated in the case of *Buccleugh* v. *Metropolitan Board of Works, L. R. 5 H. L. 418*, but where charges of dishonesty are made the Court would reject no evidence of an arbitrator which could be of assistance in informing itself whether such charges were established. In this case the charges of dishonesty and partiality were *held* to have entirely failed. Where part of an award was found to be invalid as being in excess of the arbitrator's powers, and it was separable from the rest, the remainder of the award being good was maintained. It is generally desirable that an arbitrator should make and retain for subsequent use, if necessary, notes of the proceedings before him; but there is no warrant for holding that in the absence of such notes an award should be set aside at the instance of one of the parties, who must be held to have known the general course of procedure, and who did not make any protest until after the making of the award with the terms of which she was not satisfied. AMIR BEGAM *v.* BADR-UD-DIN HUSAIN (1914) . **I. L. R. 36 All. 336**

4. ——— *Private award, if compulsorily registrable—Deed of partition and award, distinction between.* The word "award" in cl. (*b*) of s. 17 of the Indian Registration Act is not restricted to awards filed in Court and a private award is not compulsorily registrable. But a document which purports to be an award may amount to something more than an award; if the parties to the reference affix their signatures to the award in token of their acceptance of the decision of the arbitrators, the award may thereupon become a deed of partition and may as such become compulsorily registrable. TEK LAL SINGH *v.* SRIPATI CHOW DHURI (1913) . . . **18 C. W. N. 475**

5. ——— *Award filed out of time—Agreement of parties not to dispute award—Civil Proceedure Code (Act V of 1908), s. 148,*

ARBITRATION—*concld.*

sch. II, cls. 8, 15 and O. XXIII, r. 3. Where the Court granted time till the 28th of February 1914 for "filing" the award, and the arbitrators made an award in the Hindi language on that date and also signed the same, but instead of filing it on that day had the same renderd into English and filed the same on the 2nd of March following: *Held*, that the word "filing" in the Court's order was a clerical error and since the Hindi award was "made" within the time fixed by Court, it did not matter that the award rendered into English was prepared and filed two days later; the requirements of the law had been satisfied and the award was a good one. *Quœre:* Whether *Shib Krishna v. Satish Chandra, I. L. R. 38 Calc. 522*, had been rightly decided having regard to the change in the law made by the wordings of s. 148 and sch. II, cls. 8 and 15 of the Code of Civil Procedure (Act V of 1908), which would seem to give the Court discretion to extend time even after the original time for making the award has expired. Whether having regard to the above changes in the law the decision of the Privy Council in *Rajah Har Narain* v. *Bhagwunt, I. L. R. 13 All. 300: s. c. L. R. 18 I. A. 55*, is of the same binding authority as before. *Semble:* As in this case while the award was being rendered into English the parties entered into a written agreement not to dispute the award, the plaintiff was precluded from questioning the award. The agreement might be regarded as amounting to a fresh submission and acceptance of the English award as an award binding on all the parties to the agreement, or it might be regarded as a lawful adjustment of the suit which might be enforced as a decree under O. XXIII, r. 3. SRI LAL *v.* ARJUN DAS (1914) **18 C. W. N. 1325**

6. ——— *Jurisdiction—Power of Court to supersede an arbitration proceeding under its orders before submission of award—Revision—Civil Procedure Code, 1908, s. 115, sch. II, para. 15. Semble:* That the intention of the second schedule to the Code of Civil Procedure is that when once a reference to arbitration has been made under the orders of the Court that reference should only be superseded for one of the reasons given in the schedule itself, and that allegations of corruption against the arbitrator should be dealt with under para. 15, after the award has been received. Even if a Civil Court possesses inherent jurisdiction to suspersede an arbitration proceeding under its orders, such jurisdiction should be cautiously and sparingly exercised, and an application invoking such jurisdiction should at least suggest grounds for supposing that the applicant will suffer some irreparable injury if prompt action is not taken. The High Court can interfere in revision when the inherent jurisdiction of a Court is exercised wrongly and with material irregularity. *Atlas Assurance Company* v. *Ahmedbhoy Habibbhoy, I. L. R. 34 Bom. 1*, not followed. CHATARBHUJ *v.* RAGHUBAR DAYAL (1914) . . **I. L. R. 36 All. 354**

ARBITRATION ACT (IX OF 1899).

——— **ss. 13, 14—**

See ARBITRATION **I. L. R. 41 Calc. 313**

——— ——— **s. 19—**

See ARBITRATION. **I. L. R. 41 Calc. 35**

AREA.

——— **deficiency in—**

See KABULIYAT **I. L. R. 41 Calc. 493**

ARMS.

——— *Possession of a gun by the servant of a licensee in order to take to a Magistrate for renewal of the license without intention to use the same—Arms Act (XI of 1878), s. 19 (f).* A servant of the holder of a gun-license who is merely carrying it to a Magistrate with the expiring license for renewal thereof, but without any intention to use the gun, is not liable to conviction under s. 19 (*f*) of the Arms Act. *Queen-Empress v. Tota Ram, I. L. R. 16 All. 276*, and *Prabhat Chandra Chowdhury* v. *Emperor, I. L. R. 35 Calc. 219*, followed. CHARU CHANDRA GHOSE *v.* EMPEROR (1913) . **I. L. R. 41 Calc. 11**

ARMS ACT (XI OF 1878).

——— ——— **s. 19 (f)—**

See ARMS . . **I. L. R. 41 Calc. 11**

ARMY ACT, 1881 (44 & 45 VICT., C. 58).

——— **ss. 136, 190—**

See CIVIL PROCEDURE CODE (ACT V OF 1908), S. 60, CL. (2) (*b*).
I. L. R. 38 Bom. 667

ARREARS OF RENT.

See INTEREST . **I. L. R. 41 Calc. 342**

ARREST.

See ARREST BY PRIVATE PERSON.

——— **by Excise Inspector—**

See RIOTING . **I. L. R. 41 Calc. 836**

——— **powers of—**

See CRIMINAL PROCEDURE CODE, S. 54 (*1*).
I. L. R. 36 All. 6

——— **without warrant—**

See RIOTING . **I. L. R. 41 Calc. 836**

ARREST BY PRIVATE PERSON.

——— *Private person making offender over to a chowkidar to be taken to the thana—Escape of the offender—Legality of the chowkidar's custody—Criminal Procedure Code (Act V of 1898), s. 59—Penal Code (Act XLV of 1860), ss. 224, 223/106.* Where a private person has lawfully arrested an offender under s. 59 of the Criminal Procedure Code but made him over to a chowkidar to be taken to the thana, the custody of the latter is not lawful, within ss. 224 and 223/106 of the Penal Code, inasmuch as he is not

RREST BY PRIVATE PERSON—*concld.*

police-officer within the meaning of the term s. 59 of the Criminal Procedure Code. *Kalai Kalu Chowkidar, I. L. R. 27 Calc. 366,* followed. URNA CHANDRA KUNDU *v.* EMPEROR (1913) **I. L. R. 41 Calc. 17**

RTICLES OF ASSOCIATION.

See COMPANIES ACT (VI OF 1882), SS. 76, 77 . . **I. L. R. 36 All. 416**

SSAM LABOUR AND EMIGRATION ACT (VI OF 1901).

——— **ss. 2, 152, 162, 164**—*Illegal recruitment f cooly—Repatriation at the expense of the em-loyer—Jurisdiction of Magistrate.* In a case nder s. 164 of the Assam Labour and Emi-ration Act for illegal recruitment of coolies ne Sub-Deputy Magistrate while acquitting ne accused, made an order that the proprietor f the garden should deposit the expenses of epatriation of the coolies in question: *Held,* hat the Sub-Deputy Magistrate not being ap-ointed by the Local Government within the neaning of s. 2 of the Act, his order was *ultra ires.* That the order was also bad on the ground hat the Sub-Deputy Magistrate did not call pon the employer to show cause against the rder, there being an acquittal of the accused nd nothing to show undue influence or coercion. KING-EMPEROR *v.* RIHE CHAMAR (1914) **18 C. W. N. 1143**

SSEMBLING WITH ARMS.

See DACOITY . **I. L. R. 41 Calc. 350**

SSESSMENT.

See CANTONMENTS ACT (III OF 1880), S. 22 . . **I. L. R. 38 Bom. 293**

——— **principle of—**

See MUNICIPALITY **I. L. R. 41 Calc. 168**

SSESSORS.

See DACOITY . **I. L. R. 41 Calc. 350**

SSIGNEE OF DECREE.

See LANDLORD AND TENANT. **I. L. R. 41 Calc. 926**

SSIGNMENT.

——— **of decree to defeat creditors—**

See DECREE . **I. L. R. 37 Mad. 227**

SSIGNMENT OF DEBT.

See SUCCESSION CERTIFICATE ACT (VII OF 1889), S. 4 . **I. L. R. 36 All. 21**

TTACHMENT.

See APPEAL . **I. L. R. 41 Calc. 160**

See CIVIL PROCEDURE CODE (1908), S. 60, CL. (2) (*b*). **I. L. R. 38 Bom. 667**

See MORTGAGE. **I. L. R. 38 Bom. 10**

ATTACHMENT—*concld.*

——— **of debt—**

See CIVIL PROCEDURE CODE (1882), SS. 268, 278, 283. **I. L. R. 38 Bom. 631**

See EXECUTION OF DECREE. **I. L. R. 38 Bom. 631**

ATTACHMENT BEFORE JUDGMENT.

See CIVIL PROCEDURE CODE, O. XXXVIII, R. 5 . . **I. L. R. 38 Bom. 105**

ATTORNEY.

See PROFESSIONAL MISCONDUCT. **I. L. R. 41 Calc. 113**

See SANCTION FOR PROSECUTION. **I. L. R. 41 Calc. 446**

AUCTION-PURCHASER.

——— **dispossession of—**

See LIMITATION . **I. L. R. 41 Calc. 52**

AUTREFOIS ACQUIT.

——— *Acquitted by jury of some charges and disagreement as to the others—Retrial on the latter—Acquittal of murder —Subsequent trial for culpable homicide not amounting to murder charged at the previous trial—Acquittal of constructive murder by direction of the Judge on a point of law, effect of—Retrial for abetment previously charged—"Tried again," meaning of —Retrial after discharge of jury on disagreement, whether a second trial or continuation of the previous one—Double pleas of "not guilty" and "autrefois acquit," validity of—When plea of previous acquittal or conviction may be taken—Applicability of English law as to pleas in India—Criminal Procedure Code (Act V of 1898) ss. 271 272, 308, 403—Constructive murder—Criminal act by one and not all charged therewith—Abetment when abettor present or absent—Instigation and aid by presence at the place of occurrence—Difference between English and Indian law—Penal Code (Act XLV of 1860), ss. 34, 109, 114—Verdict on facts against the direction of the Judge.* S. 403 of the Criminal Procedure Code protects an accused against a subsequent trial for the same offence, and on the same facts, for any other offence for which a different charge from the one made aganist him "might have been made," but was not made, and not when such different charge was made at the previous trial and the jury disagreed as to it. Where a prisoner was tried at the High Court criminal sessions for murder and abetment of the murder of a police officer, under ss. $\frac{302}{34}$, $\frac{302}{114}$ and $\frac{302}{109}$, and also for murder and culpable homicide of another person, under ss. 302 and 304 of the Penal Code, and the jury returned a unanimous verdict of acquittal under ss. $\frac{302}{34}$ by the direction of the Judge in the first case and of acquittal under s. 302, in the second case, but differed as to the remaining charges by 5 to 4 and were discharged: *Held,* that s. 403 of the Criminal Procedure Code

AUTREFOIS ACQUIT—*contd.*

did not prevent a retrial on the latter charges. Where a prisoner is unanimously acquitted of some of the charges, and the jury are divided as to the rest and discharged, and he is "retried" under s. 308 of the Criminal Procedure Code before a different jury, he is not being "tried again," within the meaning of s. 403, but his retrial is on the original indictment and plea, and the Court continues the trial before another jury, and the process may continue till a verdict is passed on all the counts. S. 403 of the Criminal Procedure Code has nothing to do with pleading, being in terms a limitation on the jurisdiction of the Court, and is not to be construed with reference to the English law of criminal pleading. Ss. 271 and 272 contain all that is necessary as to pleading without reference to the English rules. Under s. 271 the accused can only plead "guilty," or claim to be tried, or he can refuse to plead, but the plea of "not guilty" is intentionally not recognized by the Code. If an accused claims to be tried he can, subject to special provisions, take any objection to his trial or conviction before the verdict of the jury and in any form. A defence under s. 403 may, therefore, be set up at any time before verdict and in any form, and the question must be decided solely according to the terms of the section irrespective of the English law. The question is one of law to be decided by the Judge without reference to the jury. *Semble*: That if the case was governed by English law, (i) the prisoner having, at the commencement of the retrial, made a plea of "not guilty," which was still awaiting adjudication, could not at the same time plead *autrefois acquit*, and that the second plea was, therefore, unnecessary and of no effect. *Rex* v. *Banks*, [1911] *2 K. B. 1095*, referred to; (ii) that the proper course would, under that law, have been to take a verdict from the jury at once on the plea. *Rex* v. *Parry*, *7 C. & P. 836*, referred to; (iii) that under the same law, a verdict on one count and disagreement on the others would not, in the case of a retrial, affect the trial on the latter. *Reg.* v. *Grimwood*, *60 J. P. 809*, not followed. S. 34 of the Penal Code must be read according to its own terms without reference to the doctrine of the English law, and applies only where a criminal act is done by several persons of whom the accused charged thereunder is one, and not where the act is done by some person other than the latter. Where, therefore, two persons fire at another and only one actually hits and kills him, the other is not guilty of murder under ss. $\frac{302}{34}$, but of attempt to murder, which offences do not constitute the same "act." *Queen-Empress* v. *Mahabir Tiwari*, *I. L. R. 21 All. 263*, *Gouridas Namasudra* v. *Emperor*, *I. L. R. 36 Calc. 659*, not followed. There is no reason for saying that a person must be absent in order to abet under s. 109 of the Penal Code. The instigation of the unknown murderer by accompanying him to the place of occurrence and by aiding him in his flight afterwards might have taken place

AUTREFOIS ACQUIT—*concld.*

though the accused was not present at the murder. But when the evidence shows that he was so present, s. 114 applies. Ss. 109 and 114 of the Penal Code supersede the English law as to principles in the first and second degrees and accessories before the fact. The provisions of the Penal Code cover all the cases provided by that law, and contain the whole law in India on the points. Where the Judge has directed an acquittal under ss. $\frac{302}{34}$ of the Penal Code on legal grounds, the verdict of the jury to that effect has not determined any question of fact, and the acquittal has no effect on the trial of charges under ss. $\frac{302}{109}$ and $\frac{302}{114}$. Where the Judge expresses an opinion that if the facts given in evidence are believed, the accused is guilty of murder, the jury have a right to disagree with his view and acquit the prisoner of the offence. EMPEROR *v.* NIRMAL KANTA ROY (1914)
I. L. R. 41 Calc. 1072

AVYAVAHARIKA.

——— **meaning of—**

See HINDU LAW—DEBT.
I. L. R. 37 Mad. 458

AWARD.

See ARBITRATION . **I. L. R. 36 All. 336**

See CIVIL PROCEDURE CODE (1908), SCH. II, ARTS. 15, 16; O. XXXII, r. 7.
I. L. R. 36 All. 69

remission of—

See ARBITRATION . **I. L. R. 41 Calc. 313**

B

BABUANA GRANT.

1. ——— *Darbhanga Raj —Government revenue and cesses whether payable to Raj—Revenue not paid to Raj—Debt, whether a joint family debt—Mitakshara family—Decree against father personally—Debt not proved to be illegal or immoral—Whether the interest of the sons passes.* Holders of *babuana* property in the Darbhanga Raj are liable to pay Government revenue and cesses to the Raj. Where the income of the *babuana* property was appropriated by members of the family, and the Government revenue and cesses payable were not paid, the liability to pay the Government revenue and cesses should be considered as a joint family debt and not the personal debt of the holder for the time being. Even if it were considered to be a personal debt of the father, in execution of a decree against the father alone the entire family property could be sold and not merely the personal interest of the father, as the debt could not be attached as an immoral debt. Every debt incurred by the father in a Mitakshara family not for illegal or immoral purposes is of a nature to support a sale of the entirety of the family property. In execution of

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a money-decree against the father alone for a personal debt of the father, the whole family property may be sold, if the debt was not contracted for immoral purposes and it is not absolutely necessary that the son should be a party either to the suit itself or to the proceedings in execution. Where it appears from the form of the suit or of the execution proceedings or from the description of the property put up for sale that only the interest of the father in the property was intended to be sold and was put up for sale, the interest of the sons would not pass by such a sale, and in such a case, the absence of the sons from the suit or execution proceedings would be a material element for consideration. Where, on the other hand, the proceedings show that the intention was to sell the entire property and the same was sold and bargained for, then the purchaser would be entitled to the whole, and the sons, though not parties to the proceedings cannot, claim their shares against the purchaser except by proving that the debt was contracted for immoral purposes. The words "right title and interest" of the judgment-debtor may either mean the share which the father might have sold to satisfy his debt or the share which he would have obtained on partition, and the question what was intended to be sold or was sold in each case will depend upon its own circumstances. Where in the sale proclamation the property to be sold at an auction sale was described as "7 as. 8 gds. 3 karas of Pandaul . . Touzi No. 6473 . ." *i.e.*, the entire family property, and the property was purchased by the decree-holder for Rs. 55,000, and an application for setting aside the sale was rejected on the ground that the evidence in proof of the insufficiency of price could not be deemed good and satisfactory, and the sale was confirmed with the following order: "Whereas *M* purchased for 55,000 the rights and interests in the properties specified below, and thirty days have expired, and an application for setting aside the sale has been rejected the sale is hereby confirmed;" but in the certificate of sale, the description of the property was to the same effect as that in the sale proclamation, and, finally, it was not suggested that the price paid was not the full value of the property purchased: *Held*, that the words "rights and interests" in the order confirming the sale do not raise any ambiguity, or induce the Court to hold that only the personal interest of the father was sold and that under the circumstances the entire family property passed to the purchaser. *Deendyal* v. *Jugdeep, L. R. 4 I. A. 247, Suraj Bansi Koer* v. *Sheo Prasad Singh, L. R. 6 I. A. 88,* explained. *Baijun Doobey* v. *Brij Bhookun, L. R. 2 I. A. 275 : s. c. I. L. R. 1 Calc. 133, Shimboo* v. *Golap, L. R. 14 I. A. 77 ; s. c. I. L. R. 14 Calc. 573, Hari Narain* v. *Rudar, I. L. R. 10 Calc. 626,* referred to. *Muddun Thakoor* v. *Kantoo Lal, L. R. 1 I. A. 321, Minakshi* v. *Immudi, L. R. 16 I. A. 1 : s. c. I. L. R. 12 Mad. 142, Nanomi Babuasin* v. *Modun, L. R. 13 I. A. 1, Bhagbut* v. *Girija, I. L. R. 15 Calc. 717, Daulat* v. *Mehr, I. L. R. 15 Calc. 70, Mahabir* v. *Meheswar, I. L. R. 17 Calc. 584, Kagal* v. *Manjappa, I. L. R. 12 Bom. 691,* followed. *Held*, further, that the words "rights and interests" in the order confirming the sale could not override the terms of the sale proclamation. HITENDRA SINGH *v.* RAMESHUR SINGH (1913)

18 C. W. N. 42.

BABUANA GRANT—*contd.*

2. _____ *Darbhanga Raj —Liability to pay its share of revenue and cesses if a charge on subject of grant—Partition by two sons of grantee with concurrence of Raj subject to condition that non-defaulting share would be sold for arrears after sale-proceeds of defaulting share found insufficient—Condition if creates a charge—Suit for arrears of one share—Death of owner thereof—Substitution of the other co-sharer as representative and widow not admitted as party at plaintiff's instance—Decree against other co-sharer only—Civil Procedure Code (Act XIV of 1882), ss. 367, 368—Plaintiff to choose representative of deceased defendant at his own risk—Claim to represent by person other than plaintiff's nominee—Proper procedure—Suit thereon, against estate in widow's possession, if maintainable—Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 122, 132.* The condition in a *babuana* grant to a junior member of the Darbhanga Raj family that the grantee shall regularly pay the Government revenue and cesses due from the portion of the estate given in *babuana* to the Raj treasury, does not create a charge in favour of the Raj in respect of overdue arrears of revenue and cesses upon the property granted. Where on the grantee's death his two sons, with the concurrence of the holder of the Raj, divided the estate equally and separate accounts of their liabilities were opened, subject however to the condition that on default by either the Raj would be entitled to join the other in a suit to recover the arrears, and that execution of the decree obtained, the defaulter's share was to be put up for sale first and only on the proceeds proving insufficient the share of the other would be sold for the balance: *Held*, that the arrears payable by the defaulting co-sharer were not by this agreement made a charge on any portion of the estate granted, and, if at all, then on the share of the non-defaulting co-sharer only. On the death of one of the two co-sharers, dispute having arisen between his widow and the surviving co-sharer as to their right to represent the deceased's estate exclusively as his heir, the Raja in a suit instituted against the two co-sharers to recover arrears due on account of the share of the deceased only, applied for substitution of the surviving co-sharer, in the place of the deceased and the widow's application to be added or substituted as representative of the deceased was on the Raja's opposition dismissed on the express understanding that she would not be bound by the decree and that her interests would in no way suffer, and subsequently, being unable to execute the decree as the share of the deceased was in the possession of his widow and the share of the surviving co-sharer could not be proceeded against under the agreement until the other share was sold, the Raja instituted a suit for a declaration that the share in the widow's

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possession was liable to pay the arrears covered by the decree in the previous suit and that the arrears were a charge on that share: *Held*, that the suit was not in the circumstances maintainable as a suit on a judgment, and the limitation of 12 years applicable to such a suit did not apply. *Ramaswami Chettiar* v. *Oppilamani Chetti, I. L. R. 33 Mad. 6, Kadir Mohideen Marakkayar* v. *Muthu Krishna Ayyar, I. L. R. 26 Mad. 230, Prosunna Chunder Bhattacharjee* v. *Kristo Chytunno Pal, I. L. R. 4 Calc. 342*, distinguished. That as the arrears in question were not a charge on the share, the suit could not be treated as one to enforce a charge and the 12 years' limitation applicable to such a suit also did not apply. RAMESHWAR SINGH *v.* JANESHWARI (1913) . . . **18 C. W. N. 129**

BABUANA AND SOHAG GRANTS.

See HINDU LAW—INHERITANCE.
L. R. 41 I. A. 275

BAIL.

See SUICIDE . **I. L. R. 37 Mad. 156**

BAIL BOND.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 514 (5) **I. L. R. 37 Mad. 156**

BANDHUS.

See HINDU LAW—INHERITANCE.
L. R. 41 I. A. 290

BANKER.

See SUCCESSION ACT (X OF 1865), s. 190.
I. L. R. 38 Bom. 618

BENAMI, PROOF OF.

Circumstantial evidence. Direct evidence to prove a transaction *benami*, cannot be expected, since the whole object of such a transaction is to suppress evidence of the real facts. The true facts can be proved by circumstantial evidence. SAMBHO KUOR *v.* HARIHAR PERSHAD (1914) . . **18 C. W. N. 1071**

BENAMIDAR.

See CIVIL PROCEDURE CODE (1908), s. 11.
I. L. R. 36 All. 446

Benamdar, if may sue on mortgage—Sons, if may object to benamidar's decree against father. A usual mortgage decree was obtained by a mortgagee who put it into execution and the sale of the mortgaged property was notified to take place on a certain date when the sons of the mortgagor brought a suit for declaration that they were not bound by the mortgage or by the decree made on the basis thereof on the ground that the decree-holder was not the real mortgagee, but only the ostensible mortgagee for the benefit of a real creditor and consequently he was not entitled to enforce the security though it stood in his name: *Held*, that the person named in the

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mortgage-deed was entitled to sue on it and it was not competent to the mortgagor to dispute that the ostensible mortgagee was entitled to maintain the suit and the sons of the mortgagor were bound by the mortgage-bond equally with the executant and did not stand in any better position. KIRTIBAS DAS *v.* GOPAL JIU (1913) . **18 C. W. N. 814**

BENGAL ACT.

——— **1866—IV.**

See CALCUTTA POLICE ACT.

——— **1868—VII.**

See BENGAL LAND REVENUE SALES ACT.

——— **1869—VIII.**

See LANDLORD AND TENANT PROCEDURE ACT.

——— **1870—VI.**

See VILLAGE CHOWKIDARI ACT.

——— **1876—VI.**

See LAND REGISTRATION ACT.

——— **1879—IX.**

See COURT OF WARDS ACT.

——— **1880—VI.**

See BENGAL DRAINAGE ACT.

——— **1880—IX.**

See CESS ACT.

——— **1882—II.**

See BENGAL EMBANKMENT ACT.

——— **1884—III.**

See BENGAL MUNICIPAL ACT.

——— **1885—III.**

See LOCAL SELF-GOVERNMENT ACT.

——— **1890—IX.**

See CALCUTTA PORT ACT.

——— **1895—I.**

See PUBLIC DEMANDS RECOVERY ACT.

——— **1899—III.**

See CALCUTTA MUNICIPAL ACT.

——— **1908—VI.**

See CHOTA NAGPUR TENANCY ACT.

——— **1909—V.**

See BENGAL EXCISE ACT.

BENGAL DRAINAGE ACT (BENG. VI OF 1880).

——— **ss. 36, 36A, 38**—*Costs of drainage construction—Apportionment—Person made liable, engagement to pay in instalments by—Recovery by certificate from purchaser.* The Provisions of the Public Demands Recovery Act for summarily recovering the amount due from a landholder under an engagement entered into under s. 38 of the Bengal Drainage Act can only be put in force against the person who gave it. They cannot be enforced against a person who has subsequently purchased his properties and who has not been made liable for the costs of construction under s. 36A of the Bengal Drainage Act. NAGENDRA BALA CHOWDHURANI *v.* THE SECRETARY OF STATE FOR INDIA (1914) . . . **18 C. W. N. 944**

BENGAL EMBANKMENT ACT (BENG. II OF 1882).

——— **ss. 54 to 59, 68, 74—**

See EMBANKMENT.

I. L. R. 41 Calc. 130

BENGAL EXCISE ACT (BENG. V OF 1909).

——— **ss. 2, 46, 48, 75, 81, 84—**

See EXCISE . . **I. L. R. 41 Calc. 694**

——— **ss. 2 (*12*), 46 (*a*), 52, 61.—**

See COCAINE . **I. L. R. 41 Calc. 537, 545**

——— **s. 19, cl. (*4*)**—*Government Notification—Possession of cocaine.* A notification issued by Government under s. 19, cl. (*4*) of the Excise Act has the force of law, and under the notification, dated the 20th November 1911, it is an offence for any person other than those specified to have any cocaine at all, except with a medical man's prescription and then only 5 grains. In all cases, the burden of proof to show under what authority he obtained cocaine lies on the accused. EMPEROR *v.* MUKUND SAHU (1914) . **18 C. W. N. 1023**

——— **ss. 67, 70—**

See RIOTING . **I. L. R. 41 Calc. 836**

BENGAL LAND REVENUE SALES ACT (BENG. VII OF 1868).

——— **s. 8—**

See REVENUE SALE.

I. L. R. 41 Calc. 276

BENGAL MUNICIPAL ACT (BENG. III OF 1884).

——— **ss. 85, 116—**

See MUNICIPALITY—ASSESSMENT.

I. L. R. 41 Calc. 168

BENGAL, N. W. P. AND ASSAM CIVIL COURTS ACT (XII OF 1887).

——— **s. 8—**

See JURISDICTION.

I. L. R. 41 Calc. 866

BENGAL, N. W. P. AND ASSAM CIVIL COURTS ACT (XII OF 1887)—*concld.*

——— **s. 21—**

See JURISDICTION.

I. L. R. 41 Calc. 915

BENGAL REGULATION (VIII OF 1819).

——— **ss. 8, 11, 13—**

See LANDLORD AND TENANT.

I. L. R. 41 Calc. 926

BENGAL TENANCY ACT (VIII OF 1885).

——— **ss. 5 cl. (*2*), 20 cl. (*3*), 44. 82.**

See NON-OCCUPANCY RIGHT.

I. L. R. 41 Calc. 1108

——— **ss. 19, 21**—*Person claiming to be raiyat at fixed rates under invalid lease, if may have acquired occupancy right by possession—Permanent lease by Hindu widow, twelve years' occupation under—Right of occupancy acquired before Act, saving of. Bhut Nath Naskar* v. *Surendra Nath Dutta, 13 C. W. N. 1025,* is no authority for holding that a person who claims the higher status of *raiyat* at fixed rates cannot, if the claim is disallowed, fall back upon and establish, if he can, the lower status of an occupancy *raiyat.* A permanent *raiyati* lease of land in which the grantor has the qualified interest of a Hindu female heir is invalid. But the lessees would nevertheless acquire occupancy right in the holding after 12 years' possession as *raiyat.* Where such lease commenced in March 1873 : *Held,* that irrespective of whether the provisions of the Bengal Tenancy Act operate to prevent the acquisition of occupancy right by a person claiming to be a *raiyat* at fixed rates or not, in this case occupancy right was acquired before the Bengal Tenancy Act came into force and was saved by s. 19 of that Act. ICHHYAMOYI *v.* KAILASH CHANDRA MUKHOPADHYA (1913) . . . . **18 C. W. N. 358**

——— **s. 26**—*Occupancy holding, if may be bequeathed by will.* Except under local usage an occupancy holding is not capable of being bequeathed by will. *Amulya Ratan Sircar* v. *Tarini Nath Dey, 18 C. W. N. 1290,* followed. *Dayamayi* v. *Ananda Mohan Roy, 18 C. W. N. 971,* referred to. KUNJA LAL ROY *v.* UMESH CHANDRA ROY (1914) . . . **18 C. W. N. 1294**

——— **s. 29**—*Occupancy raiyat—Enhancement of rent by contract—Stipulation in original kabuliyat—Colourable evasion of statute.* Where a kabuliyat executed by an occupancy raiyat contained a statement that the rent for the holding was Rs. 57-4 in all, but that out of this the sum of Rs. 17-2 was remitted and the rent was fixed at Rs. 40-2 for the period of the kabuliyat, and it was further stipulated that at the end of the term the tenant "shall take a settlement at the rate of Rs. 57-4 and if he does not the landlord shall be entitled to realise that rent by suit;" and the lower Appellate Court found that the rent really settled was Rs. 40-2, and that the reference to Rs. 57-4

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

———— **s. 29**—*concld.*

was merely a device to evade the provisions of s. 29 of the Bengal Tenancy Act: *Held*, that s. 29 was a bar to the recovery of the rent by the landlord at Rs. 57-4. MOHAMAYA KAR *v.* KISHORE CHUNG (1913) . . . **18 C. W. N. 738**

———— **ss. 50, 105**—*Question of enhancibility of rent if a question under s. 105—Presumption under s. 50—Kabuliyat executed since Permanent Settlement—Confirmatory lease.* Where in a proceeding for settlement of rent under s. 105 of the Bengal Tenancy Act, the Settlement Officer held that the rent of the tenant was not enhancible by reason of the application of s. 50 of the Bengal Tenancy Act, and the Special Judge on appeal held that the tenure having originated in a kabuliyat of 1238, the rent was enhancible: *Held*, that the question decided being a question relating to an incident of the tenancy did not come under s. 105 of the Act and a second appeal was not barred by s. 109A of the Act; that as the kabuliyat was a document by which a previously existing lease was recognised, the presumption under s. 50 of the Act applied. BISHESHUR RAY CHOWDHURY *v.* RAJENDRA KUMAR SINGH (1914) . **18 C. W. N. 949**

———— **ss. 54, 61, 62, 195**—

See DEPOSIT IN COURT.
I. L. R. 41 Calc. 1000

———— **s. 61**—*Manager, tender of rent to, but not at village office, if valid—Tender of part as whole—Deposit of portion of rent due, if valid—Contract Act (IX of 1872), s. 38.* A deposit in Court by a tenant of less than the amount of arrears of rent due is not a valid deposit under s. 61 of the Bengal Tenancy Act. Any officer of the zemindar authorised to receive rent who happens to be in the village office can receive it and give a valid acquittance. But because a man happens to be the manager of the zamindari, he cannot be compelled to take rent tendered wherever he may happen to be and at whatever time or place it may be offered. Nor can he be asked to take a small proportion of the rent due as the whole amount. SATI PROSAD GARGA *v.* MONMOTHA NATH KAR (1913) . **18 C. W. N. 84**

———— **ss. 65, 66, 148** (*h*)—

See LANDLORD AND TENANT.
I. L. R. 41 Calc. 926

———— **s. 85** (*2*)—*Under-raiyat, sub-lease by—Permanent lease by under-raiyat if invalid—Application by analogy of statutory provision to cases outside it—Permanent lease described as one for nine years to meet objection of Registering Officer.* S. 85 of the Bengal Tenancy Act has no application to a permanent lease created by an under-raiyat in favour of a sub-lessee: nor can the provisions of that section be applied to such a case by analogy. *Ram Chunder Dutt* v. *Jughes Chunder Dutt, 19 W. R. 353*, referred to. The leases in this case were held to be permanent leases. GURUDAS DAS *v.* KALI DAS CHANGA (1914) . **18 C. W. N. 882**

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

———— **s. 86** (*6*)—*Non-transferable holding, transfer of portion of—Collusive surrender by transferer to landlord—Landlord if may eject transferee.* Where after transferring a portion, a raiyat surrenders the whole of his holding to the landlord: *Held*, that, if the surrender be collusive, the tenancy subsists; and, so long as the tenancy subsists, the landlord is not entitled to eject the transferee of a portion of the holding. *Quære:* Whether a purchaser of a portion of a holding is not protected under sub-s. (*6*) of s. 86, Bengal Tenancy Act. *Tamizuddin Khan* v. *Khoda Nawaz Khan, 14 C. W. N. 229*, commented on. *Gagan Chandra Chowdhury* v. *Alek Chand Saha, 17 C. W. N. 698*, distinguished. ASKAR ALI *v.* GOUPEE MOHAN CHOWDHURY (1913) . . . **18 C. W. N. 601**

———— **s. 103A**—*Draft record-of-rights, entries in, if admissible in evidence in rent suits.* Entries in a draft record-of-rights published under s. 103A of the Bengal Tenancy Act are not admissible in evidence in a suit for rent. It is not until the record-of-rights is finally published that the presumption of correctness arises. GULAB KOER *v.* RAMRATAN PANDE (1913) . **18 C. W. N. 896**

———— **s. 105**—*Excess land, settlement of rent on, if may be made on application for settlement of fair rent—Jurisdiction of revenue officer—Question arising under s. 106, if may be dealt with.* In a proceeding under s. 105 of the Bengal Tenancy Act as it stood in 1904, the Settlement Officer has jurisdiction to settle fair rent and to direct settlement of fair rent on excess land found in the tenant's possession. *Rameswar Singh* v. *Bhubaneswar Jha, I. L. R. 33 Calc. 837*, relied on. *Lukhi Narain Serowji* v. *Sri Ram Chandra Bhuiya, 15 C. W. N. 921*, referred to. Even if settlement of additional rent on excess land did not come within the purview of that section, and the matter was really one to be dealt with under s. 106, the settlement of fair rent on excess land in a proceeding under s. 105 would not be beyond the jurisdiction of the Settlement Officer. *Prithee Chand Lal Chowdhury* v. *Basarat Ali, I. L. R. 37 Calc. 30*, referred to. PALTOO PANDEY *v.* SRI NEWAS PROSAD SINGH (1913) . . **18 C. W. N. 165**

———— **s. 105**—*Record-of-rights, correctness of, if can be impugned by landlord under s. 105—Unrecorded landlord, if can apply.* The correctness of the record-of-rights can be impugned by the landlord, in an application made under s. 105 of the Bengal Tenancy Act. Issues mentioned in s. 105A can be tried in a proceeding for settlement of rent under s. 105. Where an applicant under s. 105 purchased a tenure in an estate of which he himself was the proprietor: *Held*, that the mere fact that his name did not appear in the *khatian* as owner of the tenure was no ground for holding that he was not entitled to apply under s. 105 of the Bengal Tenancy Act. UPENDRA NATH GHOSH *v.* JAMINI MOHAN PAL (1913) . **18 C. W. N. 268**

———— **ss. 105, 106, 158**—*Record-of-rights, alteration by Revenue Officer more than two months after final publication—Civil suit by proprietor to*

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

s. 105—*concld.*

assess fair and equitable rent, if maintainable—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 181—Correctness of Revenue Officer's decision if can be challenged in civil suit—Record-of-rights if can be referred to, to ascertain rent of contiguous land. In a proceeding under s. 106 of the Bengal Tenancy Act the Revenue Officer directed that certain lands entered in the record-of-rights as held rent-free be recorded as liable to payment of rent. This order was made more than two months after the date of the certificate of final publication of the record. The plaintiff, the proprietor, thereupon instituted a suit in the Civil Court for the assessment of fair rent, it being too late for him to apply under s. 105 of the Act: *Held*, that the suit was maintainable, if not under the general law, as a suit in the nature of a declaratory suit, then as an application under s. 158. That s. 109 did not stand in the way of the suit, no proceeding having been taken under s. 105 for the fixation of a fair and equitable rent. The cause of action in the suit arose after the decree under s. 106 of the Bengal Tenancy Act was passed. *Quære:* Whether Art. 131 read with s. 23 or Art. 120 of the Limitation Act applied. *Held*, that applications under s. 158 of the Bengal Tenancy Act are not governed by Art. 181 of Sch. I of the Limitation Act. That it was not open to the defendants to contest in the civil suit the correctness of the decision of the Revenue Officer and to raise again the question of their liability to pay rent. That the lower Appellate Court was not wrong in law in referring to the record-of-rights for the purpose of ascertaining the rents payable in respect of lands in the vicinity similar to those in suit. The scheme of ss. 105, 106, etc., of the Bengal Tenancy Act seems to be that matters brought at once or within a strictly limited time before the Revenue Officer are to be dealt with by him, while matters not so brought before the Revenue Officer are left to the ordinary law and the Civil Courts. BERHAMDUT MISSER *v.* RAMJI RAM (1913) . . . **18 C. W. N. 466**

s. 106—*Scope of enquiry under—Title if can be determined.* A Revenue Officer in deciding disputes between rival proprietors under s. 106 of the Bengal Tenancy Act is confined to the question of possession alone and is not competent to determine the question of title. *Padmalav* v. *Lukhi Rani, 12 C. W. N. 8*, followed. RAM CHANDRA BHANJA *v.* NANDANANANDA GOSSAIN (1913) **18 C. W. N. 938**

ss. 106, 107—*Suit dismissed for default of plaintiff, after evidence of defendants taken and examined—Formal decree drawn up—Order of dismissal if appealable—"Decision," meaning of, if excludes dismissal for default.* The decision of a Settlement Officer to which the force and effect of a decree of a Civil Court is given by s. 107 of the Bengal Tenancy Act, does not include an order of dismissal of a suit under s. 106 of the Act, for default, the word "decision" implying an adjudication on the merits. Where, in such a suit, the plaintiff being absent, the Court received the evidence of the defendants, expressed an opinion on the merits but ultimately made an order of dismissal for default under r. 8 of O. IX of the Civil Procedure Code: *Held*, that the order was, as it could only have been made, under r. 8 of O. IX. The Court should not have received the defendant's evidence or examined the merits of the case. That a formal decree which was unnecessarily drawn up did not alter the nature of the order which was not a decree and was not open to appeal. PARBATI *v.* TOOLSHI KAPRI (1913) . . . **18 C. W. N. 604**

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

s. 106—*concld.*

s. 148A "*Landlord and tenant*," *meaning of—Nature of suit under the section—Usufructuary mortgagee if a landlord—S. 158B—Co-sharer landlords, who are—Usufructuary mortgagee of a portion from a co-sharer if a co-sharer landlord—Decree for rent obtained by such mortgagee how to be executed—Civil Procedure Code (Act V of 1908), O. III, r. 14, if applies to such a decree—Revisional jurisdiction of the High Court, circumstances warranting the exercise of.* The petitioner was a usufructuary mortgagee from a co-sharer landlord who was interested in the property to the extent of one-fourth, the opposite parties being entitled to the remaining three-fourths share. The petitioner as usufructuary mortgagee brought a suit for rent against the tenant under s. 148A of the Bengal Tenancy Act and joined the proprietors of the three-fourths share as also the mortgagor as parties defendants. The co-sharers did not enter appearance and the plaintiff obtained a decree for rent and applied for execution under sub-s. (*1*) of s. 158B of the Bengal Tenancy Act, whereupon the co-sharers appeared and objected that the execution could not proceed under s. 158B. The objection was overruled by the Court of first instance, but the lower Appellate Court directed the first Court to hold the sale not under sub-s. (*2*) of s. 158B of the Bengal Tenancy Act, but in accordance with the Code of Civil Procedure: *Held*, that the term "landlord" means a person immediately under whom a tenant holds, and the term "tenant" is defined to mean a person who holds land under another person and is or, but for a special contract, would be liable to pay rent for that land to that person, and a usufructuary mortgagee is consequently a person immediately under whom a tenant holds and is in the position of a landlord and is entitled to sue for rent in his character as such. That the co-sharer landlords are the entire body of persons who are entitled to collect rent, and a usufructuary mortgagee from one of the proprietors is in the position of a co-sharer landlord within the meaning of s. 158B, sub-s. (*1*), cl. (*e*) of the Bengal Tenancy Act. That the plaintiff having sued for the recovery of what to his information was the whole arrear due, the suit was in essence a suit for rent due to all the co-sharers within the meaning of s. 148A of the Bengal Tenancy Act, and the suit as framed was within the scope of that section, and the decree should be executed under

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

——— **s. 148A**—*concld.*

s. 158B, sub-s. (*1*), cl. (*e*) of the Bengal Tenancy Act. That r. 14 of O. XXXIV of the Civil Procedure Code had no application to the execution proceedings in the present case. That the result of the decision of the District Judge was that the Court of first instance had to proceed to sell the tenure in accordance with the provisions of the Code of Civil Procedure which it had no jurisdiction to do and to refuse to sell the tenure in accordance with s. 158B of the Bengal Tenancy Act which it had jurisdiction to do and the circumstance that this result followed from an erroneous interpretation of the scope and requirements of ss. 148A and 158B of the Bengal Tenancy Act was clearly no bar to the exercise of the revisional jurisdiction of the High Court. BROHMANAND NATH DEB *v.* HEM CHANDRA MITRA (1914) . . **18 C. W. N. 1016**

——— **s. 153**—*Suit for rent by lessee contested by tenant—Denial of lessee's title—Appeal.* Where the plaintiff claiming to have derived title under a lease from defendant No. 3, the landlord, sued the tenants on the land for rent, but the tenants contested his claim on the ground that the lease given to him by defendant No. 3 was invalid, though defendant No. 3 himself did not appear or oppose plaintiff's claim, and the lower Appellate Court sustained the tenants' plea and dismissed the suit: *Held* by JENKINS, *C.J.* (agreeing with RAY, *J.*, COXE *J.*, *contra*), that the decree decided a question relating to title to land or to some interest in land as between parties having conflicting claims thereto, within s. 153, Bengal Tenancy Act, and an appeal lay. *Held per* COXE and RAY, *JJ.*—An *ex parte* decree for rent obtained by the plaintiff against defendants in a previous suit is *res judicata* in a subsequent rent-suit, unless the defendants can establish that the relationship of landlord and tenant established by the decree ceased since the passing of the decree. GAUHAR ALI *v.* SAMIRUDDIN SHEIKH (1913) . . **18 C. W. N. 33**

——— **s. 158**—*Tenant holding same land under separate leases of undivided shares from co-sharers if may proceed against co-sharers separately.* An application under s. 158 of the Bengal Tenancy Act to determine the incidents of a tenancy cannot be made against persons who have only a portion of the proprietary interest in the land of the tenancy even when the tenant applicant appears to have taken separate leases from different landlords of their respective undivided interests therein. HARI MOHAN MAJUMDAR *v.* SRI MOHAN GHOSH (1913) . . . . **18 C. W. N. 168**

——— **ss. 160** (*c*), **167**—"*Protected interest*"—"*Plantation,*" *meaning of—Boroj or betel plantation, if* "*protested interest*"—"*Date of sale,*" *meaning of.* The word "plantation" is one of wide significance and would include an assemblage of growing plants of any kind that have been planted. As to whether or not a particular assemblage of plants comes within the policy of s. 160, cl. (*c*) of the Bengal Tenancy Act, must be largely, if not exclusively, a question of fact. The lower Appellate Court having held a "*boroj*" or betel plantation to be a plantation within the meaning of the section: *Held*, that it could not be said on the materials on the record that that Court's determination of the question was erroneous. BANKO BEHARY DAS *v.* KRISHNA CHANDRA BHOWMICK (1913) . . . **18 C. W. N. 349**

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

——— **s. 160**—*concld.*

——— **s. 167**—*Suit to annul incumbrance—Persons interested in incumbrance, if should be all made parties—Addition of parties on appeal—Prejudice—Notice of annulment—Service.* In a suit for *khas* possession of certain mouzahs comprised in a *putni* taluk purchased by the plaintiffs at an auction sale under the decree for rent obtained by the zamindar, the defendants, who with one *N* claimed to be *durputnidars* of the mouzahs in suit, having objected that *N* had not been joined as a party, the suit was dismissed by the subordinate Judge, *inter alia*, on the ground of non-joinder of *N*, but on the plaintiff's application to the High Court at the hearing of their appeal from the decision of the Subordinate Judge, *N* was ordered to be made a party defendant to the suit which was remanded to the lower Court. *N* did not appeal against the decision of the High Court: *Held*, that *N* was not at any time a necessary party to the suit so far as the other defendants were concerned and they were not prejudiced by the fact that *N* was added as a defendant when the suit was in appeal and the omission to make an original defendant, did not make the suit bad for non-joinder as against the other defendants who were the appellants before the Privy Council. That the plaintiff having proved that the notices of annulment of incumbrances were served on the defendants in the manner prescribed for service of summons in the Civil Procedure Code, the notices were duly served in accordance with Government Rules made in that behalf. ANANDA GOPAL GOSSAIN *v.* NAFAR CHANDRA PAL CHOWDHURI (1913)
18 C. W. N. 259

——— **s. 169** (*c*)—*Rent accrued due between the date of sale and confirmation thereof—Liability whether judgment-debtor's or auction purchaser's—Liability of the surplus sale-proceeds—Civil Procedure Code* (*Act V of 1908*), *s. 65.* In view of the alteration in the law made by s. 65 of the Civil Procedure Code of 1908, the liability of the surplus sale-proceeds under s. 169 of the Bengal Tenancy Act is limited to arrears accrued due up to the date of the sale and cannot be extended to arrears due up to the date of confirmation thereof. Arrears accrued due between these dates cannot be recovered from the judgment-debtor. BEJOY CHAND MAHTAP *v.* SASHI BHUSAN BOSE (1913)
18 C. W. N. 136

——— **s. 174**—*Rent sale—Application to set aside sat by deposit—Deposit made by judgment-debtor a he instance of prior purchaser and with money found by him—Subsequent withdrawal of application if to be allowed—Refund of money deposited and withdrawn, order for—Enforcement, as*

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

——— **s. 174**—*concld.*

decree for money. Where some of the judgment-debtors applied under s. 174 of the Bengal Tenancy Act to set aside a sale for arrears of rent and also deposited the requisite amount in Court: *Held*, that the application was in order as in fact made by the judgment-debtor though it was stated in a note appended thereto that the tenants had long before the sale transferred the holding to a stranger and that the money had been furnished by the purchaser. When, therefore, after the deposit, the judgment-debtors withdrew the application to set aside the sale with the consent of the decree-holder: *Held*, on the application of the purchaser, that the Court should have set aside the sale. The money deposited having been withdrawn by the judgment-debtors they were ordered to refund it in Court within 7 days, and if they failed to do so, the lower Court was directed to execute the order as a decree and thus realise the money. NITYANUND DAS *v.* UDAI NARAIN MONDAL (1913) **18 C. W. N. 175**

——— **ss. 174, 185**—*Application to set aside sale made after 30 days—Allegation of fraud by which applicant kept from knowledge of sale—Extension of time if may be given—Limitation Act (XV of 1877), s. 29, sub-s. (1), cl. (b).* A judgment-debtor applying to set aside a sale under s. 174 of the Bengal Tenancy Act cannot rely on s. 18 of the Limitation Act for an extension of the period of 30 days allowed for such an application on the ground that he had been kept from the knowledge of the sale by the fraud of the decree-holder. RADHASHYAM KAR *v.* DINABANDHU BISWAS (1913) . . . **18 C. W. N. 31**

——— **s. 180** (*1*)—*Diara land, tenant holding—Reduction of rent upon diluviation, if may be claimed by him.* A raiyat who holds *diara* land cannot, until he has acquired occupancy right in his holding by twelve years' continuous possession, demand a reduction of rent under cl. (*b*) of sub-s. (*1*) of s. 52 of the Bengal Tenancy Act. "Holding" in sub-s. (*1*) of s. 180 of the Act means the holding as the tenant received it from the landlord. *Jahander Baksh Mullik* v. *Ram Lal Hazra, 14 C. W. N. 470*, referred to. SRINISASH PROSAD SINGH *v.* RAM RAJ TEWARY (1914) . **18 C. W. N. 598**

——— **s. 188**—*Suit by co-sharer landlord for additional rent, if maintainable—Parties—Right of, of suit.* Where a co-sharer landlord brought a suit for arrears of rent and also for additional rent on the basis of a kabuliyat executed by the tenant in favour of the entire body of landlords agreeing to pay additional rent for additional area, and made his co-sharers parties to the suit: *Held*, that the suit for additional rent was not maintainable, as it was not brought by all the landlords jointly under s. 188 of the Bengal Tenancy Act. *Held*, also, that the existence of the stipulation in the kabuliyat about the payment of additional rent did not take the suit out of the Bengal Tenancy Act. *Gopal Chandar* v. *Umesh Narain, I. L. R. 17 Calc. 695, Baidyanath* v. *Ilim, 2 C. W. N. 44*: *s. c. I. L. R. 25 Calc. 917*, followed. *Gobindra Chandra* v. *Hamidullah, 7 C. W. N. 670*, distinguished on the ground that there was an entirely separate agreement between the tenant and the individual co-sharer landlord which did not exist in the present case. The entire body of landlords must join as plaintiffs in a suit under s. 188 of the Bengal Tenancy Act. *Jatindra Nath* v. *Prasanna Kumar, 15 C. W. N. 74*, referred to. DWARKA DHAKAI *v.* MATHU LAL MAJUMDAR (1913) . . **18 C. W. N. 942**

BENGAL TENANCY ACT (VIII OF 1885)—*concld.*

——— **s. 188**—*concld.*

——— **ss. 195, cl.** (*e*), **11, 12 and 17**—*Putni, sale of, registered under the Act, but not recorded in zamindar's sherista under the Putni Regulation (VIII of 1819), s. 3—Zemindar, if must recognise sale—Inconsistent provisions of statutes.* The Putni Regulation provides rules for the alienation of the whole or a part of a *putni* taluk and these cannot be affected by anything in the Bengal Tenancy Act in view of s. 195, cl. (*e*) of the latter Act. The registration of a sale of the whole or a part of a *putni* tenure under s. 12 of the Bengal Tenancy Act does not give the purchaser an interest in the land by force of ss. 12 and 17 of the Act. SHAIZUDDIN *v.* MATHURA MOHAN SAHA (1913) **18 C. W. N. 338**

——— **Sch. III, Art. 3**—

See LIMITATION . **I. L. R. 41 Calc. 52**

BEQUEST.

See WILL . **I. L. R. 38 Bom. 697**

BHAGDARI ACT (BOM. V OF 1862).

See CONTRACT ACT (IX OF 1872), s. 65. **I. L. R. 38 Bom. 249**

——— **s. 3**—*Bhag—Permanent tenancy of lands in existence prior to the passing of the Bhagdari Act (Bombay Act V of 1862)—Alienation by permanent tenant—Death of the alienor—Intervention by Collector—Eviction of the alienee—Alienation by permanent tenant not null and void.* In a bhag a person, who claimed to be a permanent tenant and who was found to be so prior to the passing of the Bhagdari Act (Bombay Act V of 1862), sold his permanent tenancy to the plaintiffs. After the death of the plaintiffs' vendor, the Collector intervened under s. 3 of the Bhagdari Act (Bom. Act V of 1862), removed the plaintiffs and placed the Bhagdar in possession. The plaintiffs having brought a suit against the Bhagdar to recover possession: *Held*, that s. 3 of the Bhagdari Act (Bom. Act V of 1862) was not applicable and the alienation to plaintiffs was not null and void, that where rights were found to have existed before the Bhagdari Act (Bom. Act V of 1862) in persons, not themselves Bhagdars or Narwadars, but the *locus* of whose rights fell within what were bhags or shares in the Bhagdari and Narwadari village, those rights never had been "any portion of bhags or shares of Bhagdari or Narwadari village, etc.," within the meaning of s. 3, and, therefore, the pro-

BHAGDARI ACT (BOM. V OF 1862)—*concld.*

——— **s. 3**—*concld.*

hibitions against alienations contained in s. 3 had no applicability to that class of cases. VENIDAS NARANDAS *v.* BAI HARI (1914) **I. L. R. 38 Bom. 679**

BHINNA-GOTRA SAPINDAS.

See HINDU LAW—INHERITANCE. **L. R. 41 I. A. 290**

BIHAR AND ORISSA.

——— **Government of—**

See PUBLIC PROSECUTOR. **I. L. R. 41 Calc. 425**

BILL OF LADING.

——— **mere possession of—**

See COCAINE . **I. L. R. 41 Calc. 537**

BOARD OF REVENUE.

——— **instructions of—**

See RIOTING . **I. L. R. 41 Calc. 836**

BOMBAY ACT.

——— **1862—V.**

See BHAGDARI ACT.

——— **1863—II.**

See SUMMARY SETTLEMENT ACT, BOMBAY.

——— **1869—XIV.**

See CIVIL COURTS ACT, BOMBAY.

——— **1874—III.**

See HEREDITARY OFFICES ACT, BOMBAY.

——— **1879—V.**

See LAND REVENUE CODE, BOMBAY.

——— **1879—VII.**

See IRRIGATION ACT, BOMBAY.

——— **1879—XVII.**

See DEKKHAN AGRICULTURISTS' RELIEF ACT.

——— **1880—I.**

See KHOTI SETTLEMENT ACT.

——— **1888—III.**

See BOMBAY MUNICIPAL ACT.

——— **1888—VI.**

See GUJARAT TALUKDARS ACT.

——— **1901—III.**

See BOMBAY DISTRICT MUNICIPAL ACT.

BOMBAY ACT—*concld.*

——— **1905—I.**

See COURT OF WARDS ACT, BOMBAY.

——— **1905—II.**

See GUJARAT TALUKDARS AMENDMENT ACT.

BOMBAY DISTRICT MUNICIPAL ACT (BOM. III OF 1901).

——— **s. 56**—*Irrigation Act (Bom. Act VII of 1879)—Drainage cut—Drainage channel—Neglect of proper repairs by local bodies—Flow of water across the road into plaintiffs' field—Damage—Liability of local bodies—Non-feasance—Neglect of highways.* Where drainage water passing along a certain drainage cut owing to some default instead of flowing along the assigned channel flowed across the road into the plaintiffs' field and caused damage to the plaintiffs and the damage was found to be due not to the authorized drainage work but to the neglect of the drainage channel which the Municipality was bound to repair. *Held*, that the Municipality was liable to the plaintiffs in damages. *Per Curiam:* The exemption from liability of local bodies on the ground of non-feasance is confined to neglect of highways and does not apply to drainage works carried out by the local bodies for their convenience, which they are bound to maintain in a proper state of repairs so that they shall not be a nuisance to the neighbouring owners. *Borough of Bathurst* v. *Macpherson, 4 App. Cas. 256, Municipality of Pictou* v. *Geldert, [1893] A. C. 524,* referred to. DHOLKA TOWN MUNICIPALITY *v.* PATEL DESAIBHAI (1913). **I. L. R. 38 Bom. 116**

——— **ss. 92, 96**—*Erection of a new building—Application to Municipality for permission—Condition requiring the owner to keep certain space vacant for widening street—Condition not valid.* The plaintiff applied to the Municipality for permission to rebuild her house. The Municipality granted the permission on the condition, among others, that she should, in rebuilding the house, keep a specified space vacant and unbuilt upon for the improvement of the street by widening it. The plaintiff disregarded the condition and built upon the specified space. Thereupon the Municipality having threatened the demolition of the house, the plaintiff brought the present suit for an injunction restraining the Municipality from doing so: *Held*, that under s. 96 of the Bombay District Municipal Act (Bom. Act III of 1901) the Municipality was empowered to prescribe the location of the building in relation "to any street existing or projected as they think proper," whereas in the present case they had prescribed the location of the building in relation, not to the existing street, but to a street which might come into existence in the future. The object of the Municipality in imposing the condition was not for the purposes of sanitation or ventilation but to get a set-back which could not be obtained under s. 92 of the Act. If the condition of the permit were complied with,

BOMBAY DISTRICT MUNICIPAL ACT (BOM. III OF 1901)—*concld.*

——— s. 92—*concld.*

the plaintiff would have to give up or keep vacant or unproductive a considerable portion of her land and the Municipality would have the opportunity of paying compensation for it at any time they might feel disposed to do so, which would be contrary to the provisions of s. 92 which contemplates that when a set-back is determined upon compensation should be paid to the owner and that the plaintiff was entitled to an injunction as prayed. *Queen-Empress* v. *Veerammal, I. L. R. 16 Mad. 230,* referred to. BAI FATMA *v.* RANDER MUNICIPALITY (1914) . . **I. L. R. 38 Bom. 597**

——— ss. 113, 122—*Suit against Municipality for re-instating a stone removed by it—Plaintiff's adverse possession—Municipality creature of the statute—Duties of Municipality—Municipal District—Encroachment—Obstruction to safe and convenient passage—Notice of removal—Justification by reference to statutory powers.* In a suit brought against a Municipality to restrain them from obstructing the plaintiff in re-instating a stone which was imbedded in his *ctla* in its original position, the lower Appellate Court found that the stone had been *in situ* for twelve years, therefore the Municipality had no right to interfere with it as there had been adverse possession for the statutory period of the portion of the street occupied by the stone. On second appeal by the Municipality, *held,* that the Municipality was the creature of the statute with duties, *inter alia,* to preserve the passage along public streets. It mattered not for the Municipality whether the encroachment had been in existence for 12 years or more. Under s. 113 of the District Municipal Act (Bom. Act III of 1901) the Municipality might, on proof that the encroachment objected to was an obstruction to the safe and convenient passage along a street, by written notice require the owner to remove it. Section 122 of the Act empowered the Municipality to remove the encroachment which might have been put up after the place had become a Municipal District. In the present case the Municipality having failed to justify their action by reference to the said statutory powers, the decree was confirmed. DAKORE TOWN MUNICIPALITY *v.* TRAVEDI ANUPRAM (1913) . . . **I. L. R. 38 Bom. 15**

BOMBAY MUNICIPAL ACT (BOM. III OF 1888).

——— ss. 289, 293—*Indian Railways Act (IX of 1890), s. 7—Public streets—Vesting of public streets in Municipality—Laying railway lines under statutory authority over such streets—Land acquisition Act (I of 1894), s. 7—Proceedings under Land Acquisition Act unnecessary in case of such streets.* The Great Indian Peninsula Railway, in constructing a line of railway known as the Harbour Branch Railway in the Island of Bombay, laid down the lines of rails in a level-crossing across a public street known as Sewri-Koliwada Road, vested in the Municipal Corporation of

BOMBAY MUNICIPAL ACT (BOM. III OF 1888)—*concld.*

——— s. 289—*concld.*

Bombay under s. 289 of the City of Bombay Municipal Act, without permission granted by the Municipal Corporation. The Municipal Corporation sued to obtain a declaration that the Railway Company could not lawfully maintain their lines of railway across the street in question without either obtaining permission granted by the Corporation and confirmed by the Government under s. 293 of the City of Bombay Municipal Act or acquiring the land required for the level-crossing under the Land Acquisition Act, 1894: *Held,* that the statutory authority under s. 7 of the Indian Railways Act was established and that the application of s. 293 of the City of Bombay Municipal Act was excluded by the words "notwithstanding anything in any other enactment for the time being in force" in the first mentioned section. *Held,* further, that where a railway company wished to lay a line of railway upon and across a street it was neither necessary nor appropriate to proceed under the Land Acquisition Act for the acquisitoin of the land, because if the Government under s. 7 of the Act were to direct the Collector to take order for the acquisition of the land he would make his award and take possession and the land would then vest absolutely in Government for the railway company free from incumbrances and would then cease to be a portion of the street and the railway company would be unable to exercise the power given to it of constructing the railways upon and across the "street." *Held,* further, that the effect of section 289 of the City of Bombay Municipal Act vesting all public streets, pavements, stones and other materials in the Corporation and under the control of the Commissioner was only to vest in that body such property as was necessary for the control, protection and maintenance of the street as a highway for public use. G. I. P. RAILWAY COMPANY *v.* MUNICIPAL CORPORATION OF THE CITY OF BOMBAY (1914) **I. L. R. 38 Bom. 565**

BOND.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 269 . **I. L. R. 37 Mad. 17**

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 125. **I. L. R. 37 Mad. 125**

See LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 116, 66, s. 19. **I. L. R. 38 Bom. 177**

BREACH OF CONTRACT.

——— to deliver goods at a particular time—

See CONTRACT ACT (IX OF 1872), ss. 39 55, 63, 73 . **I. L. R. 37 Mad. 412**

BUILDING.

See BOMBAY DISTRICT MUNICIPAL ACT (BOM. ACT III OF 1901), ss. 92, 96. **I. L. R. 38 Bom. 597**

BUILDING—*concld.*

——— **by co-owner**—

See TEMPORARY INJUNCTION.
I. L. R. 41 Calc. 436

BUNDELKHAND ALIENATION OF LAND ACT (II OF 1903).

——— **s. 9**—*Mortgage—Suit for foreclosure—Plea of defendants that they were members of an agricultural tribe—Reference to Collector—Effect of Collector's finding in the negative.* In a suit for foreclosure of a mortgage against two sets of defendants, both sets pleaded that they were members of an agricultural tribe to whom the provisions of the Bundelkhand Alienation of Land Act, 1903, applied, and a reference was accordingly made to the Collector under s. 9 (*3*) of that Act. The Collector took action under the Act with regard to one set of defandants, but as to the other set decided that they were not members of an agricultural tribe: *Held*, that this finding left the Civil Court no option but to continue the proceedings before it independently of the provisions of the Bundelkhand Alienation of Land Act, 1903. GOVIND RAO *v.* KAMTA PRASAD (1914)
I. L. R. 36 All. 376

BURDEN OF PROOF.

See HINDU LAW—LEGAL NECESSITY.
I. L. R. 36 All. 187

See MAHOMEDAN LAW—DIVORCE.
I. L. R. 36 All. 458

See MAHOMEDAN LAW—PRE-EMPTION.
I. L. R. 38 Bom. 183

See MORTGAGE . **I. L. R. 36 All. 478**

See PRE-EMPTION **I. L. R. 36 All. 464**

BURMESE LAW.

——— *Inheritance—Sisters in trade living apart from, and independent of, their father—Succession of elder sister to property of younger sisters in priority to father.* The appellant was the eldest, and the survivor, of three sisters, daughters of the respondent. They traded in cocoanuts in the Municipal market in Rangoon, and lived together apart from, and quite independently of, their father: *Held* (reversing the decision of the Cheif Court of Lower Burma), that, by the Burmese Buddhist Law, and irrespective of any question of partnership between them, the appellant succeeded to the property of her sisters in preference to the respondent. The balance of the authority of the Dhammathats, pre-eminent among which is the Manu Kyay, is upon the side of the brothers and sisters of a deceased person being preferred to the parent. MA NHIN BWIN *v.* U SHWE GONE (1914) . **I. L. R. 41 Calc. 887**

BUSTEE LAND.

See LAND ACQUISITION.
I. L. R. 41 Calc. 967

BUSTEE LAND—*concld.*

1. ——— *Notice on owners to carry out improvements thereon—"Owners," meaning of—Co-sebait during turn of management of debuttur property and collection of rents and profits by another sebait—Liability of sebait not in receipt of rents and profits—Previous convictions—Calcutta Municipal Act (Ben. III of 1899), ss. 3 (32), 408, 575.* Where *debuttur* property is managed according to a settled scheme by the co-sebaits in rotation and the rents and profits collected, for the time being, by the persons enjoining their turn, a sebait out of turn is not an "owner" within the meaning of s. 3 (*32*) of the Calcutta Municipal Act nor in any other sense, and is not liable to carry out a requisition under s. 408 of the Act. A sebait is not an owner but only a manager for the deity. RATNENDRA LAL MITTER *v.* CORPORATION OF CALCUTTA (1913) . . **I. L. R. 41 Calc. 104**

2. ——— *Lease of same by owner to others—Sub-lease by latter—Requisition on owners to carry out improvements—Application by him to Chief Judge, only against his lessee—"Occupier," meaning of—Obstruction by sub-tenants in actual occupation—Discharge of owner from liability—Previous conviction of owner—Calcutta Municipal Act (Beng. III of 1899), ss. 3 (30), 408, 575, 622.* The owner of a bustee, who has leased it out to others and is thereafter served with a notice under s. 408 of the Calcutta Municipal Act, to carry out certain bustee improvements, is discharged from obligation where he has proceeded and obtained an order under s. 622 against his lessee only and is prevented by the sub-tenants of the latter, actually in occupation, from executing the required improvements. *Semble:* The lessee may take action under s. 622 against his tenants in the event of their proving refractory, and he can, on failure to do so, be himself proceeded against under ss. 574 and 575 of the Act. BENODE LAL GHOSE *v.* CORPORATION OF CALCUTTA (1913)
I. L. R. 41 Calc. 164

C

CALCUTTA MUNICIPAL ACT (BENG. III OF 1899).

——— **ss. 3 (*30*), 408, 575, 622**—

See BUSTEE LAND.
I. L. R. 41 Calc. 164

——— **ss. 3 (*32*), 408, 575**—

See BUSTEE LAND.
I. L. R. 41 Calc. 104

——— **s. 557 (*c*), (*d*)**—

See LAND ACQUISITION.
I. L. R. 41 Calc. 967

CALCUTTA POLICE ACT (BENG. IV OF 1866).

——— **s. 13 B, cl. (*c*)**—*Police officer being in possession of money when on duty—Contravention of*

CALCUTTA POLICE ACT (BENG. IV. OF 1866) —*contd.*

——— **s. 13 B,**—*concld.*

order of Commissioner of Police—Order contravened, necessity of proof of—Plea of guilty, qualified. The petitioner was placed on his trial under s. 13B., cl. (c), of Beng. Act IV of 1866 for being, while on duty, in possession of annas four, contrary to an order of the Commissioner of Police. After the examination of one witness the petitioner pleaded guilty to having the money in his possession. He, however, stated before the Magistrate that at the time in question he was not on duty, but engaged in the private business of a police officer and also that he had been on duty the previous night. The Magistrate convicted the accused on this plea of guilty. The order, the contravention of which was the subject-matter of the prosecution, was not proved: *Held*, that a copy of the Government order or an extract therefrom or a reference thereto should have been placed on the record. That the petitioner's plea of guilty was to be looked upon merely as an admission of the fact that he had at the time in question the sum found upon his person. The High Court set aside the conviction and sentence and directed a retrial by a new Magistrate. GAYA RAY *v.* EMPEROR 1914 **18 C. W. N. 1273**

CALCUTTA PORT ACT (BENG. IX OF 1890).

——— **s. 91.**

See CARRIERS . **I. L. R. 41 Calc. 703**

CANCELLATION OF DEED.

——— **suit for—**

See PARDANASHIN LADY.

I. L. R. 36 All. 81

CANTONMENTS ACT (III OF 1880).

——— **s. 22**—*Limitation Act (IX of 1908), Art. 62—Taxes levied by cantonment authorities—Payment under protest—Jurisdiction of Civil Courts to entertain suit for recovery of payment—Assessment on the annual letting value—Payment by cheque—Limitation runs from the date of the receipt of the money by the payee.* Civil Courts have jurisdiction to entertain a suit to recover the amount of taxes levied by the cantonment authorities and paid under protest on the ground that the assessment was illegal. This may be the case both when a serious demand requiring very attentive consideration had been made on the plaintiffs and reasonable time has not been given to the latter to take advice on the subject and when the cantonment authorities have wholly disregarded the basis on which the rate should have been assessed, by assessing the rate upon the gross income of the plaintiffs. *Kasandas* v. *Ankleshvar, I. L. R. 26 Bom. 294*, followed. In assessing a tax based on the annual letting value of premises, it is illegal to take the annual income derived from the premises as the basis of calculation. In case of payment by a cheque, limitation runs not from the date of the delivery of the cheque, but from the date of the receipt of the money by the payee. SECRETARY OF STATE FOR INDIA *v.* MAJOR HUGHES (1913) . **I. L. R. 38 Bom. 293**

CANTONMENTS ACT (III OF 1880)—*concld.*

——— **s. 22**—*concld.*

CARRIAGE OF GOODS.

See CONTRACT . **I. L. R. 41 Calc. 670**

CARRIERS.

1. ——— *Loss of goods—Undeclared luggage—Carriers Act (III of 1865), ss. 3, 4, 8, 9:—Negligence of carrier or his agent—Liability.* Where loss of or damage to goods was caused by negligence or criminal act of the carrier or any of his agents or servants, the carrier is liable for the loss although the value and description of the goods were not declared nor was a higher charge paid for them. *Cahill* v. The *London North-Western Railway, 13 C. B. N. S. 818, Great Northern Railway Company* v. *Shephard, 8 Exch. 30, David Keays* v. *Belfast Railway Company, 9H. L. Cas. 556, Shaik Roheemulla* v. *Palmer, Ooryton's Rep. 133*, referred to. *Velayat Hossein* v. *Bengal and North-Western Railway Co., I. L. R. 36 Calc. 819*, distinguished. S. 9 of the Carriers Act clearly shows that the onus of proving negligence is not upon the plaintiff. *Sheobarut Ram* v. *Bengal and North-Western Railway Company*, 16 C. W. N. *766*, distinguished. INDIA GENERAL NAVIGATION AND RAILWAY CO., LD. *v.* GOPAL CHANDRA GUIN (1913) . . . **I. L. R. 41 Calc. 80**

2. ——— *Conversion—Misdelivery of goods—Notice of arrival—Delivery order—Unauthorised act—Reasonable conduct—Consignee, duty of, regarding delivery—Calcutta Port Act (Beng. IX of 1890), s. 91.* The plaintiff, Noel William Freeman, shipped goods from London to Calcutta under a bill of lading which provided that the goods were "to be delivered at the Port of Calcutta unto Mr. N. W. Freeman or his assigns," and in which the consignee's name and address were stated as "N. W. Freeman, Calcutta." The consignee took no steps regarding delivery of the goods on arrival, and the defendant company after landing the goods handed them over, in the usual course, to the Port Commissioners. The defendant company thereafter posted a notice of arrival addressed to "N. W. Freeman, Esq., Calcutta," which was delivered by the post office to one Nigel W. Freeman. The latter through his agent gave a letter of indemnity to the defendant company, and the agent, without production of the bill of lading, obtained from the defendant company a delivery order on the Port Commissioners for the goods, and wrongfully took delivery of the same. When communicated with, Nigel W. Freeman returned most of the goods in a damaged and deteriorated condition to the plaintiff. In a suit by the owner consignee against the shipping company for damages for misdelivery:—*Held*, that the defendant company had not done an unauthorised act in issuing the notice of arrival or the delivery order, and that they had acted in a

CARRIERS—*concld.*

reasonable and proper manner. *Hiort* v. *Bott, L. R. 9 Ex. 86*, and *The Stettin, 14 P. D. 142*, distinguished. *Heugh* v. *London and North-Western Ry. Co., L. R. 5 Ex. 51*, referred to. It is the duty of the consignee to ascertain when the goods will arrive and to be ready to take delivery. FREEMAN *v.* P. & O. S. N. Co., LD. (1913) **I. L. R. 41 Calc. 703**

CARRIERS ACT (III OF 1865).

ss. 3, 4, 8, 9.

See CARRIERS . **I. L. R. 41 Calc. 80**

CAUSE OF ACTION.

See CIVIL PROCEDURE CODE (1908), s. 20(*c*). **I. L. R. 36 All. 563**

See CIVIL PROCEDURE CODE (1908), O. II, R. 2 . . **I. L. R. 36 All. 560**

See LIMITATION ACT (IX OF 1908), Sch. I, ART. 120 . **I. L. R. 36 All. 492**

See PRACTICE . . **L. R. 41 I. A. 142**

———— **misjoinder of—**

See CIVIL PROCEDURE CODE (1908), O. II, R. 5 . **I. L. R. 38 Bom. 120**

————*Separate Cause of Action —Contract—Intention—Civil Procedure Code (Act V, 1908), O. II, r. 2, scope of—Presidency Small Cause Courts Act (XV of 1882), s. 69,—Damage suit for.* A contract by indent provided for the supply of goods by two monthly shipments, clause 13 of the contract being as follows : " This indent is to be deemed and construed as a separate contract in respect of each item and instalment of goods and your rights and liabilities and ours respectively shall be the same as though a separate indent has been made out and signed in respect of each instalment." The purchaser having failed to take delivery or pay for the goods in respect of the two shipments, the vendor brought two separate suits in the Calcutta Small Cause Court for re-sale damages, one in respect of each shipment : *Held*, that in view of the intention expressed in clause 13, the plaintiff was entitled to bring a separate suit for damages in respect of each shipment. *Volkart* v. *Sabju Saheb, I.L.R. 19 Mad. 304*, followed. *Sesha Ayyar* v. *Krishna Ayyangar, I. L. R. 24 Mad. 96, Yashvant* v. *Vithal, I. L. R. 21 Bom. 267, Umed Dholchand* v. *Pir Saheb Jiva Miya, I. L. R. 7 Bom. 134, Pramada Dasi* v. *Lakhinarain Mittier, I. L. R. 12 Calc. 60*, referred to. *Anderson Wright & Co.* v. *Kalagarla Surjinarain, I. L. R. 12 Calc. 359*, and *Duncan Brothers & Co.* v. *Jeetmull Greedharee Lall, I. L. R. 19 Calc. 372*, distinguished. MANDAL & CO. *v.* FAZUL ELLAHIE (1914) . **I. L. R. 41 Calc. 825**

CERTIFICATE OF REGISTRY.

See COASTING-VESSELS ACT, SS. 4, 7, AND 13 . **I. L. R. 38 Bom. 111**

CERTIFICATE OF SUCCESSION.

See SUCCESSION CERTIFICATE ACT (VII OF 1889), S. 4 . **I. L. R. 36 All. 21, 380**

See SUCCESSION CERTIFICATE ACT, 1889, SS. 16, 18 . **I. L. R. 36 All. 423**

CESS ACT (BENG. IX OF 1880).

———— **s. 95**— *Returns filed by certificated guardian of minor, if admissible in favour of minor —" Authorised agent."* A road cess return filed on behalf of a minor by his certificated guardian is not admissible in favour of the minor. The words in s. 95 of the Road and Public Works Cess Act requiring returns filed under the Act to bear the signature and address of the person or his authorised agent are directory only, and the fact that the certificated guardian was not the authorised agent of the minor does not make the returns admissible in his favour. RAJANI BALA DASI *v.* BHAJA HARI KOLEY (1914) **18 C. W. N. 1076**

CESTUI QUE TRUST.

See TRUST . . **I. L. R. 41 Calc. 19**

CEYLON CIVIL PROCEDURE CODE (ORDINANCE II OF 1889).

———— **s. 34**—

See PRACTICE—CAUSE OF ACTION. **L. R. 41 I. A. 142**

CHARGE.

See ABSENCE OF CHARGE.

See DACOITY . **I. L. R. 41 Calc. 350**

See TRANSFER OF PROPERTY ACT (IV of 1882), SS. 58, 100. **I. L. R. 36 All. 201**

———— **absence of—**

See CRIMINAL TRESPASS. **I. L. R. 41 Calc. 662**

———— **extinguishment of—**

See TRANSFER OF PROPERTY ACT (IV OF 1882), S. 101 . **I. L. R. 38 Bom. 369**

———— **necessity of—**

See SUMMARY TRIAL. **I. L. R. 41 Calc. 743**

1. ———— *Single head relating to three separate offences of the same kind—Defect—Duplicity or Misjoinder—Prejudice—Criminal Procedure Code (Act V of 1898), ss. 233, 234 and 537.* A single head of charge, relating to three offences of the same kind, is defective for duplicity and not misjoinder : but a trial under such a charge is not bad unless the accused has been prejudiced thereby. *Subrahmania Ayyar* v. *King-Emperor, I. L. R. 25 Mad. 61*, referred to. MUSAI SINGH *v.* EMPEROR (1913) **I. L. R. 41 Calc. 66**

2. ———— *Misjoinder—Joinder of three charges under s. 409 with three under s. 477A of the Penal Code—Legality of trial—*

CHARGE—*concld.*

Criminal Procedure Code (Act V of 1898), ss. 222 (2), 233, 234. Section 222 (2) of the Criminal Procedure Code refers to cases of criminal breach of trust or dishonest misappropriation of money, and cannot be applied to a case under s. 477A of the Penal Code. *Queen-Empress* v. *Mati Lal Lahiri, I. L. R. 26 Calc. 560,* referred to. Section 233 of the Code must be strictly followed save where the law itself provides an exception. A joinder of three charges under s. 409 with three under s. 477A of the Penal Code relating to different transactions is not warranted by any of the exceptions provided in the Code, and is illegal. Such a misjoinder is absolutely fatal to the trial. *Kasi Viswanathan* v. *Emperor, I. L. R. 30 Mad. 328,* and *Subrahmania Ayyar* v. *King-Emperor I. L. R. 25 Mad. 61,* followed. A series of falsifications of accounts made to cover a single act of defalcation may be laid in one charge under s. 477A of the Penal Code, and does not constitute distinct offences merely by reason of a plurality of false entries intended to cover the same defalcation. RAMAN BEHARI DAS *v.* EMPEROR (1913) **I. L. R. 41 Calc. 722**

3. ———— *Fixed deposit—Competence of depositor to charge money on fixed deposit in a bank as security for a loan.* It is competent to a person who has money with a banking company on fixed deposit, with the assent of such company, if not without it, to assign to any person whom he pleases, either absolutely or by way of a charge, the debt due or about to become due to him from the banking company. *Brandt's Sons & Co.* v. *Dunlop Rubber Co.,* [1905] *A. C. 154,* referred to. *Agha Mahomed Jaffar Bindanim* v. *Koolsom Beebee, I. L. R. 25 Calc. 9,* distinguished. GUR PRASAD *v.* THE GORAKHPUR BANK, LIMITED (1914) . **I. L. R. 36 All. 507**

CHARGE TO JURY.

See PRIVY COUNCIL, PRACTICE OF.
I. L. R. 41 Calc. 1023

CHARTER ACT (24 & 25 VICT. C. 104).

———— **s. 15—**

See SONTHAL PARGANAS.
I. L. R. 41 Calc. 876

See TEMPORARY INJUNCTION.
I. L. R. 41 Calc. 436

CHEQUE.

———— **payment by—**

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 62 . **I. L. R. 38 Bom. 293**

CHILD WITNESS.

———— **competency of—**

See APPEAL . **I. L. R. 41 Calc. 406**

———— **examination of, without affirmation—**

See APPEAL . **I. L. R. 41 Calc. 406**

CHOTA NAGPUR TENANCY ACT (BENG. VI OF 1908).

———— **s. 85.**—*Settlement Officer, proceeding for settlement of fair rent in the course of preparation of record-of-rights—High Court's power of superintendence over —Appeal to Commissioner—Superintendence of Board of Revenue—High Courts Act (24 & 25 Vict., c. 104), s. 15.* Although for the purposes of the application of the power of superintendence of the High Court under s. 15 of the Indian High Courts Act, it is not necessary that an appeal should lie to the High Court in the very proceeding in which the power of superintendence is invoked, where, by statute, superintendence over a Revenue Officer in a particular matter is vested in the Board of Revenue, it would be anomalous to hold that the Revenue Officer should be deemed even for the purposes of that particular proceeding a Court subordinate to the Appellate Jurisdiction of the High Court and so subject to its powers of superintendence. A proceeding in the Court of a Settlement Officer of Chota Nagpur under s. 85 of the Chota Nagpur Tenancy Act for settlement of fair rent is not subject to the superintendence of the High Court under s. 15 of the High Courts Act, as appeals from the orders of the Settlement Officer lie under statutory rules to the Commissioner, an officer not shown to be subordinate to the Appellate Jurisdiction of the High Court. UMA CHARAN MONDOL *v.* MIDNAPUR ZEMINDARY CO. LD. (1914).
18 C. W. N. 782

———— **ss.—208, 211** (*1*)—*Decree for rent against some only of registered tenants—Exemption from sale of share of persons not represented in suit—Decree if may be executed as rent decree against remaining share—Bengal Rent Recovery Act (Beng. VIII of 1860), sale under, nature of.* If a claim has been allowed in respect of some interest in a tenure under sub-s. (*1*) of s. 211 of the Chota Nagpur Tenancy Act, the decree cannot be executed as a decree for rent under s. 208 of the Act. It is open to the decree-holder to treat the decree as a decree for money and to execute it in the ordinary Civil Court. *Madan Mohan Nath Sahi* v. *Protap Uday Nath Sahi, 16 C. W. N. 1024,* distinguished. Where a decree for rent was obtained against persons who did not represent the entire tenure, the registered holder of a fourth share in it having been left out of the suit, and on the application of the latter his share of the tenure was exempted from sale under s. 211, cl. (*1*) of the Chota Nagpur Tenancy Act: *Held,* that the decree could not be executed as a rent decree under s. 208 of the Act as against the remaining three-fourths share of the tenure. The Bengal Rent Recovery Act of 1865 contemplates the sale of an entire tenure. A decree obtained against some only of the registered tenants cannot be executed as a decree for rent. CHANDRA NATH TEWARI *v.* PROTAP UDAI NATH SAHI (1913)
18 C. W. N. 170

CHOWKIDAR'S CUSTODY.

See ARREST BY PRIVATE PERSON.
I. L. R. 41 Calc. 17

CIRCUMSTANTIAL EVIDENCE.

See ADMISSIONS AND CONFESSIONS TO POLICE OFFICERS.
I. L. R. 41 Calc. 601

See PENAL CODE, S. 380.
18 C. W. N. 1144

CIVIL AND REVENUE COURTS.

See AGRA TENANCY ACT (II OF 1901), SS. 95, 167 . **I. L. R. 36 All. 48**

See AGRA TENANCY ACT (II OF 1901), S. 167, SCH. IV, GROUP C, NO. 30.
I. L. R. 36 All. 55

CIVIL CIRCULARS (1912).

——— **cl. 159—**

See CIVIL PROCEDURE CODE (ACT V OF 1908), S. 97.
I. L. R. 38 Bom. 331

CIVIL COURTS ACT, BOMBAY (BOM. XIV OF 1869).

——— **s. 16—**

See LAND ACQUISITION ACT (I OF 1894), S. 54 . . **I. L. R. 38 Bom. 337**

——— **s. 32**—*Civil Procedure Code (Act V of 1908), s. 37—Decree—Court of Wards made party after decree—Execution—Jurisdiction of the Court to execute its own decree.* The Court which passed the decree has jurisdiction to proceed with the execution notwithstanding that after the decree the Court of Wards has become a party to the execution proceeding. *Gopal Apaji* v. *Keshavrao Konherrao, I. L. R. 38 Bom. 662 note,* followed. BANDOO KRISHNA *v.* NARSINGRAO (1914) . . . **I. L. R. 38 Bom. 662**

CIVIL PROCEDURE CODE (ACT VIII OF 1859).

——— **s. 69—**

See SPECIAL OR SECOND APPEAL.
I. L. R. 37 Mad. 443

CIVIL PROCEDURE CODE (ACT XIV OF 1882).

——— **s. 13—**

See HINDU LAW-PARTITION.
L. R. 41 I. A. 247

——— **s. 19—**

See JURISDICTION . **L. R. 41 I. A. 197**

——— **s. 230**—*Decree for land and mesne profits in favour of a minor—Execution after 12 years, after decree for ascertaining mesne profits—Limitation—Limitation Act (IX of 1908), s. 6—Policy of Limitation Acts.* The prohibition contained in Civil Procedure Code (Act V of 1908), s. 48, *viz.*, that certain classes of decrees cannot be executed after 12 years, applies even to the case of minors who are decree-holders. Section 6 of the Limitation Act cannot be invoked to extend the period as s. 6, Act X of 1908, is expressly limited to cases where the limitation is provided for in the Limitation Act itself: nor is there any law apart from s. 6 to the effect that minority is a ground of exemption from the operation of the law of limitation. *Moro Sadashiv* v. *Visaji Raghunath, I. L. R. 16 Bom. 536,* not followed. *Jhandu* v. *Mohan-Lal* 29 *P.R. 489,* followed. English decisions on the policy of Limitation Acts referred to. Limitation being the result of Statute Law no exemption from it can be recognised except what the Statute itself provides. Under the old Civil Procedure Code (Act XIV of 1882) even where the decree directed that mesne profits should be ascertained in execution, the application for the ascertainment of mesne profits was one in execution only, and not in suit; so that the limitation applicable for such an application was that applicable for execution applications. An application for the ascertainment of mesne profits directed by a decree under the old Civil Procedure Code, but made after 12 years after decree, is barred by the Civil Procedure Code (Act XIV of 1882), s. 230. The new Civil Procedure Code which directs an enquiry as to the mesne profits, before passing a final decree is not applicable to such a case. The effect to be given to a document and to the proceedings of a Court must be decided by the law in force when the document was executed or the proceedings were passed. *Mutiah Chettiar* v. *Ramaswami Chettiar (Second Appeal No. 117 of 1911),* followed. Applicant's mother, as next friend of the applicant, obtained a decree in his favour for partition which was confirmed with certain modifications by the High Court on 3rd August 1897. The decree left the mesne profits subsequent to suit to be ascertained in execution. The decree also declared as follows:—" The plaintiff do recover, when collected, his one-third share of such debts as have been or can be collected with due diligence out of the debts due to the family." Various applications for execution of the decree were made by the applicant's mother and she entered into a compromise on 21st January 1900 with the judgment-debtors regarding all the matters mentioned in the decree and others and the Court passed on 6th February 1903 a final decree in terms of the compromise. Applicant became a major on 29th November 1909 and made the present execution application for partition and ascertainment of mesne profits and outstandings on 1st November 1910, repudiating the compromise on various grounds: *Held,* thatthe applications were barred by the 12 years' rule of limitation, contained in Civil Procedure Code (Act XIV of 1882), s. 230 corresponding to Civil Procedure Code (Act V of 1908), s. 48. RAMANA *v.* BABU (1914)
I. L. R. 37 Mad. 186

CIVIL PROCEDURE CODE (ACT XIV OF 1882)— *contd.*

——— **s. 230**—*concld.*

——— **s. 232**—*Benami purchase of decree by co-judgment-debtor—Failure to execute if bars right to sue for contribution.* Where a co-judgment-debtor purchases a rent decree, such a purchase is equivalent to paying off the decree, and the purchaser is entitled to bring a suit for contribu-

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

——— **s. 232**—*concld.*

tion from the other judgment-debtors although he tried to evade the provisions of s. 232 of the Code of Civil Procedure (Act XIV of 1882) by trying to execute the decree against them by a benamidar. RAM LAL MONDAL *v.* KHIRODA MOHINI DASI (1913) . . **18 C. W. N. 113**

——— **s. 244**—*If bars suit to set aside decree and sale as fraudulent.* Section 244 of Act XIV of 1882 did not apply to a suit to set aside a decree and sale thereunder on the ground that they had been obtained by fraud. BHAIJI THAKUR *v.* JHARULA DAS (1914) . . **18 C. W. N. 1029**

——— **ss. 244, 295** (*c*)—

See LIMITATION.

I. L. R. 41 Calc. 654

——— **s. 257A**—*Decree—Satisfaction—Decree not carrying interest—Mortgage passed in satisfaction of decretal debt made payable in instalments—Interest payable on failure to pay instalments—Covenant for interest can be severed from the covenant as to rep aymentof principal—Agreement not void so far as concerned principal.* The plaintiff obtained a decree against the defendant for Rs. 800 without interest, but with costs which amounted to Rs. 89-12-0. In satisfaction of the decretal debt and in consideration of a cash advance of Rs. 10-4-0, the defendant passed a mortgage-deed for Rs. 900 in favour of the plaintiff. The amount of Rs. 900 was repayable in nine annual instalments of Rs. 100 each. On failure to pay any one instalment interest was to be charged at the rate of 1¼ per cent. per mensem; and the whole amount became payable on failure to pay any two instalments. None of the instalments having been paid, the plaintiff sued to recover Rs. 900 principal and Rs. 900 as interest. The lower Courts held that the mortgage-deed contravened the provisions of section 257A of the Civil Procedure Code (Act XIV of 1882), but they passed a decree for Rs. 900 in plaintiff's favour, as the covenant to pay interest was quite distinct and severable from the covenant to pay principal. The defendant having appealed: *Held*, confirming the decree, that the primary and main agreement was to pay a sum of money which was not in excess of the decretal amount, and that it was only on failure to fulfil that agreement that interest was to be charged, that is, it was only something which came into operation when there was a breach of the agreement; and that the primary agreement was therefore not void under s. 257A of the Civil Procedure Code, 1882. *Bhagchand* v. *Radhakisan, I. L. R. 28 Bom. 62*, followed. CHATRU *v.* KONDAJI VITHAL (1913) . . **I. L. R. 38 Bom. 219**

——— **ss. 268, 278, 283**—*Civil Procedure Code (Act V of 1908), Order XXI, rules 58 and 63—Transfer of Property Act (IV of 1882), s. 132, illustration (i)—Decree—Execution—Garnishee—Attachment of debt—Objections by garnishee unsuccessful—Purchase by judgment-creditor—Suit by purchaser against garnishee—Garnishee cannot raise the same defence—Suit by garnishee, period of one year from the date of adverse order—Equity of cross debt—Setting up without payment of Court-fee—Garnishee's right of set-off—Prompt decision—Garnishee trustee for the judgment-debtor.* A brought a suit against *B* and in execution of the decree attached a debt alleged to be due to *B* by *T* under s. 268 of the Civil Procedure Code (Act XIV of 1882). *T's* objection to the attachment having failed, *A* applied for the sale of the debt and having purchased it himself at the Court sale brought a suit against *T*, the garnishee, for the recovery of the debt. Garnishee having set up the same facts in defence as he had set up when he unsuccessfully objected to the attachment: *Held*, that the equity arising from the cross debt could be set up by the defendant without payment of Court-fee as on a counter claim, that if a cross debt were due to a garnishee, there should be a right of set-off in his favour. *Held*, however, that it was not open to the garnishee to plead a defence which had already, in an execution inquiry, been unsuccessful, except in a suit instituted within one year from the date of the adverse order, that the property attached could be regarded as property in the possession of the garnishee in trust for the judgment-debtor, and, therefore, could be attached. *Held*, further, that a garnishee's claims and objections should be decided as promptly as other objections to the attachment. *Chidambara Patter* v. *Ramsawamy Patter, I. L. R. 27 Mad. 67*, followed. *Rambutty Kooer* v. *Kamessur Pershad, 22 W. R. 36*, not followed. TAYABALLI GULAM HUSEIN *v.* ATMARAM SAKHARAM (1914)

I. L. R. 38 Bom. 631

——— **s. 269**—*Rule framed under—Binding until rules made under new Civil Procedure Code—Bond given under rules deemed to be given by order of Court, stamp of —"Otherwise provided for by the Court Fees Act."—Court Fees Act (VII of 1870), Sch. II, Art. 6—Stamp Act (II of 1899), Sch. I, Art. 15.* Until rules are framed by the High Court under the new Civil Procedure Code (Act V of 1908), the rules made by Government under section 269 of the old Civil Procedure Code (Act XIV of 1882) are in force, though they may be inconsistent with Order XXI, rule 43 of the first schedule to the new Civil Procedure Code. A bond given in pursuance of the rules made under power conferred by a section of the Code must be deemed to be given in pursuance of an order made by a Court under a section of Civil Procedure Code and is consequently "otherwise provided for by the Court Fees Act" (see Schedule II, Article 6, Court Fees Act VII of 1870, and Schedule I, Article 15, of the Indian Stamp Act II of 1899). The stamp is an eight-anna stamp under the Court Fees Act. *Re* THE DISTRICT MUNSIF OF TIRUVALLUR (1914) . . **I. L. R. 37 Mad. 17**

——— **ss. 367, 368**—*Plaintiff's duty to bring proper representative of deceased defendant on re-*

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

——— **s. 367**—*concld.*

cord—Decree against wrong person—Suit against proper party based on judgment, if lies—Limitation. When a defendant dies it is for the plaintiff to choose against whom he purposes to proceed, and if some one else with an adverse claim to the nominee wishes to be made the representative, he should be added as a party. The provisions of sec. 367 of Act XIV of 1882 applied only in the case of the death of the plaintiff and had no application to the case of the death of a defendant. RAMESHWAR SINGH BAHADUR *v.* JANESHWARI BAHOOASIN (1913) . . . **18 C. W. N. 129**

——— **ss. 373 and 375A**—*Execution of decree—Procedure—Leave to withdraw with permission to make a fresh application not permissible with regard to proceedings after decree. Held,* that the provisions of Chapter XXII of the Code of Civil Procedure (1882), which allowed withdrawal of a suit with permission to bring a fresh suit, did not apply to any application subsequent to the decree, and did not permit the withdrawal of an application for execution with permission to make a fresh application. MATA PALAT *v.* BENI MADHO (1914) **I. L. R. 36 All. 172**

——— **s. 424**—

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 80 . **I. L. R. 37 Mad. 113**

——— **s. 522**—*Decree made in confirmation of an award of arbitrators, appeal if lies on the ground of invalidity of award—Art. 158 of Sch. II of the Limitation Act (XV of 1877).* There is no appeal against a decree made under s. 522, Civil Procedure Code, in confirmation of an award of arbitrators even when that decree is assailed on the ground that there was no award valid in law. *Ghulam Khan* v. *Muhammad Hassan, I. L. R. 29 Calc. 167 : s. c. 6 C. W. N. 226,* followed. The decision of the Judicial Committee in *Harnarain Singh* v. *Bhagwant Kuar, I. L. R. 13 All. 300,* cannot be treated as in any way in conflict with the later decision of the Judicial Committee in the case of *Ghulam Khan* v. *Muhammed Hassan, I. L. R. 29 Cal. 167 : s. c. 6 C. W. N. 226,* inasmuch as in the former case no question as to the competency of the appeal was raised either before the Judicial Committee or in the High Court. Where no application to set aside the award was made to the lower Court within the period of limitation prescribed by Art. 158 of the limitation Act by the guardian *ad litem* of the appellant who was a minor at the time : *Held,* that the appellant could not be allowed to invite the High Court to interfere with the decree in the exercise of its revisional jurisdiction even on the ground that the reference to arbitration was made with the concurrence of a person who had no authority to act on behalf of the guardian of the appellant and that the award had therefore no existence in the eye of the law. SURYA NARAIN JHA *v.* BANWARI JHA (1912) **18 C. W. N. 626**

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*concld.*

——— **s. 568**—

See WILL . . **I. L. R. 36 All. 93**

——— *Admission of evidence to impeach witness's credit—Opportunity to be given for explanation.* Where on appeal the Appellate Court admitted fresh evidence to prove that on a date on which a witness deposed to having attested the will he was elsewhere and could not have attended on the testator and the witness, who had not been asked anything in the original Court on this point, and whose evidence was otherwise unimpeachable, was disbelieved by the Appellate Court without being given an opportunity to offer any explanation of the matter by the Appellate Court : *Held,* that the procedure was illegal and no witness, whatever his standing, would be safe from adverse judicial comment under such procedure. JAGRANI KOER *v.* KUAR DURGA PARSAD (1913) . . . **18 C. W. N. 521**

——— **s. 584**—

See SPECIAL OR SECOND APPEAL. **I. L. R. 37 Mad. 443**

——— **ss. 629, 630**—*Application for review granted if reopens whole case or only the special questions found wrongly decided—Final decree, appeal against—Grounds on which order for review may be questioned.* When an application for review is granted and the case re-heard, in an appeal against the final decree the propriety of the order where by the review was granted can be challenged on the ground specified in sec. 629 of the Code of Civil Procedure. When no such ground can be made out, but the order is sought to be challenged on the ground that it was made without jurisdiction, the proper course for the aggrieved party is to move the High Court in revision. When an application for review has been granted, the Court is not restricted at the re-hearing to a consideration of that question alone which has been argued upon the rule for review and found to have been erroneously decided. The whole case is re-opened unless the Court directs under the latter part of s. 630 that the case is to be heard only upon special points. What was intended to be decided in *Dhuronidhar Sen* v. *The Agra Bank, I. L. R. 5 Calc. 86,* was that it was competent to the Court in its discretion to refuse to entertain at the re-hearing a question which had not been placed before the Court when the review was granted. *Hurro Chunder Chuckraburtty* v. *Ram Kissore Chuckraburtty, W. R. (1864) 142, Byjnath Sahoy* v. *Wuzeer Narain, 24 W. R. 427,* explained. *Sainal Ran Chhod* v. *Dullav Dvarka, 10 Bom. H. C. 360, Emperor* v. *Naryan Raghunath Patki, I. L. R. 32 Bom. 111, Hurbans Sahye* v. *Thakoor Purshad, I. L. R. 9 Calc. 209,* referred to. SADARUDDIN *v.* EKRAMUDDIN (1913) . . **18 C. W. N. 22**

CIVIL PROCEDURE CODE (ACT V OF 1908).

——— **ss. 2 (2), 47**—

See APPEAL . **I. L. R. 41 Calc. 160**
See DECREE . **I. L. R. 37 Mad. 29**

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

——— **ss. 2, 47, 151; O. XXXIV, r. 5**—

See APPEAL . **I. L. R. 41 Calc. 418**

——— **ss. 2, 97, O. XXVI, rr. 11, 12 (2)**—

Dekkhan Agriculturists' Relief Act (XVII of 1879)—Redemption suit—Direction to a Commissioner to take account—The direction not a preliminary decree. In a redemption suit tried under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879), the first Court, on the 15th August 1910, referred the taking of the account to a Commissioner and on the 30th August 1910 passed a decree for the plaintiffs for possession free from incumbrances, the defendants having received profits for 25 years after the debt had been paid off. One of the defendants having appealed on the 10th October 1910, the Appellate Court dismissed the appeal as time-barred on a preliminary objection taken by the plaintiff-respondents, namely, that the period of 30 days for the appeal ran from the date when the Court issued the commission to the Commissioner on the 15th August 1910 because the issue of commission constituted a preliminary decree within the definition of s. 2 of the Civil Procedure Code (Act V of 1908). The defendant having appealed to the High Court: *Held*, reversing the decree of the Appellate Court and remanding the case for disposal on the merits, that there was nothing in the Civil Procedure Code (Act V of 1908) which prevented the Appellate Court from entertaining the appeal inasmuch as there was not a preliminary decree within the meaning of s. 97 of the Code, that in applying the definition of the decree contained in s. 2 of the Civil Procedure Code (Act V of 1908), the right of the parties in respect to matters in controversy should be taken to mean the general rights in relation to status, in relation to jurisdiction, in relation to limitation, in relation to frame of the suit and in relation to liability to account which, if decided, must have a general effect upon the proceedings in the suit and could be decided preliminary to the investigation of the matters in dispute between the parties upon the merits. *Krishnaji* v. *Maruti, 12 Bom. L. R. 762*, explained. NARAYAN BALKRISHNA *v.* GOPAL JIV GHADI (1914)
I. L. R. 38 Bom. 392

——— **ss. 4, 100**—

See SPECIAL APPEAL.
I. L. R. 38 Bom. 340

——— **s. 9**—

See ELECTION . **I. L. R. 41 Calc. 384**

——— **s. 11**—

1. ——— *Evidence Act of 1872), s. 41—Probate and Administration Act (V of 1881), s. 83—Contentious proceeding for probate—Will not proved—Probate refused—Suit for recovery of property from defendants who held as executors—Judgment in the probate proceeding refusing probate not judgment in rem—Res judicata.* In a contentious proceeding for probate, the will produced by the applicants was held not proved and the probate was refused. The applicants appealed to the High Court which dismissed the appeal. The widow of the deceased thereupon brought a suit for the recovery of the property of the deceased from the defendants who held it as executors under the will and the first Court allowed the claim. On appeal by the defendants, two questions having arisen, namely, (i) whether the judgment refusing probate was as much within the scope and intention of s. 41 of the Evidence Act (I of 1872) as a judgment granting probate, and (ii) whether the judgment in the probate proceeding operated as *res judicata*: *Held*, by the Full Bench, that s. 41 of the Evidence Act (I of 1872) was not applicable to the judgment of the Appellate Court refusing probate, *Held*, further, that the judgment in the probate proceeding operated as *res judicata* between the parties under s. 83 of the Probate and Administration Act (V of 1881) and s. 11 of the Civil Procedure Code (Act V of 1908). KALYANCHAND LALCHAND *v* SITABAI (1913)
I. L. R. 38 Bom. 309

2. ——— *Res judicata between co-defendants. Per* SHAH, *J.*:—In order that any decision between co-defendants might operate as *res judicata* in any subsequent suit between them, it is necessary to establish that there was a conflict of interests among the defendants, and that there was a judgment defining the real right and obligations of the defendants *inter se*. HARI ANNAJI *v.* VASUDEV JANARDAN (1914)
I. L. R. 38 Bom. 438

3. ——— *Res judicata—Suit by plaintiffs as members of the Muhammadan Community for a declaration that certain property was waqf—Previous similar suit by other plaintiffs.* Where a suit had been brought by two persons as members of the public for a declaration that certain property was waqf property, and it had been decided that the property in question was not waqf: *Held*, that this decision operated as *res judicata* in the case of any other similar suit which might be brought by other members of the public as such claiming a similar declaration. MUHAMMAD AMIR *v.* SUMITRA KUNWAR (1914)
I. L. R. 36 All. 424

4. ——— *Res judicata—Benamidar—First suit alleging herself to be merely a benamidar, but found in that suit to be the real owner—Second suit by persons alleging themselves to be the real owners.* A suit for sale on a mortgage was brought against the ostensible purchaser of the mortgaged property. She pleaded that she was not the real purchaser but was merely a benamidar for her three sons. The Court, however, declined to accept this plea and gave a decree against the defendant upon the record as being the real purchaser. *Held*, in a subsequent suit for possession of the same property brought by the sons, that the previous decision did not operate

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

s. 11—*contd.*

as *res judicata* in respect of their claim. *Khub Chand* v. *Narain, I. L. R. 3 All. 812, Nand Kishore Lal* v. *Ahmed Ata, I. L. R. 18 All. 69, Yad Ram* v. *Umrao Singh, I. L. R. 21 All. 350, Kaniz Fatima* v. *Wali-ullah, I. L. R. 30 All. 30,* and *Gopinath Chobey* v. *Bhugwat Pershad, I. L. R. 10 Calc. 697,* referred to. MATA PRASAD *v.* RAM CHARAN SAHU (1914) . **I. L. R. 36 All. 446**

5. ——— *Explanation IV*——"*Might and ought*"—*Res judicata even as regards implied decisions, if necessary for the decree—Applicability to issues also.* *A*, a landlord, tendered a patta to *B*, his tenant, who objected to the patta on the ground that the extent of his holding was overstated, some of the lands included in the patta not belonging to *A* but to *B* himself. The issue was raised whether the patta tendered was proper; the Court found that it did not contain any objectionable matter and was therefore a proper patta. Decree was accordingly given for rent in favour of *A*. *A* tendered a similar patta to *B*, for a subsequent year and *B* again raised a similar objection to the extent of the holding. In a suit brought by *A* for the rent, *B* objected to the extent of the holding and it was contended that the matter was *res judicata* by reason of the decision in the previous suit: *Held*, by the Full Bench, upholding the contention and agreeing with MUNRO, *J.* in *Bayya Naidu* v. *Paradesi Naidu, I. L. R. 35 Mad. 216*, (*i*) that the question of the extent of the defendant's holding was directly and substantially an issue in the previous suit and must be taken to have been heard and finally decided in plaintiff's favour, as such a decision is necessarily involved in the decree passed in plaintiff's favour, seeing that if the decision had been the other way, it would, under the Rent Recovery Act, have been fatal to his suit which must have been dismissed on the ground that the patta was not a proper one; (*ii*) that even if it was not expressly in question, it must be deemed to have been raised and decided within the meaning of explanation IV to s. 11 of the Civil Procedure Code, as it was ground of defence which might and ought to have been raised by the defendant; (*iii*) and that it is unnecessry in such a case of failure to raise the available ground of defence, that there should have been an express decision by the Court upon it in order to make it *res judicata*. *Sri Gopal* v. *Pirthi Singh, I. L. R. 24 All. 429,* and *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh, I. L. R. 39 Calc. 527,* followed. *Per* SUNDARA AYYAR, *J.*—The doctrine of *res judicata* applies to suit, as well as issues and the force of *res judicata* with regard to an implied decision is applicable also to what ought to have been made ground of attack or defence with respect to an issue. The test is not whether the decision was explicit, but whether the issue was one on which the judgment of the previous suit was based quite apart from the question whether the decree itself would be affected by the matter being reopened in the later suit. If the judgment was not based upon the issue then the decision of the issue whether express or implied cannot constitute the matter *res judicata* in the later suit. *Per* SADASIVA AYYAR, *J.*—In order to constitute a decision on an issue of fact *res judicata* it is not necessary that the cause of action and the subject-matter of thesuits should be the same. Where the subject-matter of the former decision and the relief claimed therein were the same as those claimed in the subsequent litigation the Courts should try their best to hold that the causes of action are the same. A decree for rent between an ordinary landlord and tenant may not necessarily involve a decision as to the terms of the lease or as to the extent of the land comprised in the lease but a decision under the Rent Recovery Act is otherwise. BAYYAN NAIDU *v.* SURYANARAYANA (1914) **I. L. R. 37 Mad. 70**

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

s. 11—*contd.*

6. ——— *Res judicata "Persons litigating under the same title"—Reversioner allowed to recover his moiety on proof of absence of legal necessity for sale by Hindu widow—Fresh suit on the other moiety falling in—Decision on the issue of legal necessity, if res judicata.* Where the plaintiff having sued the defendant to recover possession as reversioners of property alienated by a Hindu widow, obtained a decree in respect of a moiety of the property upon a finding that the sale was not for legal necessity, but the suit was dismissed as regards the other moiety on the ground that it had not passed to the plaintiff and afterwards this moiety too having passed to the plaintiff, he again sued the defendant for recovery of this moiety: *Held*, that the decision in the previous suit that the sale was not for legal necessity was *res judicata* in the present suit, as the parties were litigating under the same title in both suits, *viz.*, the plaintiff as the owner of the reversion and the defendant as purchaser from the widow. SURYA KANTA RAY CHOWDHURY *v.* FANI BHUSAN BANARJEE (1913) **18 C. W. N. 888**

7. ——— *Res judicata.* Where in a suit on a subsequent mortgage-bond, a prior mortgagee was made a party and the plaintiff prayed for an account as to the amount due to the prior mortgagee, but the Court on the failure of the prior mortgagee to appear passed an *ex parte* decree, but no order was passed as to plaintiff's prayer for account as against the prior mortgagee: *Held*, that the Court in passing this decree never intended to say that the absence of the prior mortgagee from the trial caused the mortgagee security of the plaintiff to override the prior security which was held by the prior mortgagee. *Ajudhya* v. *Inayet, I. L. R. 35 All. 111,* followed. MOHIRUDDIN MONDAL *v.* INDRA KUMARI DASI (1914) . . . **18 C. W. N. 1013**

8. ——— *Compromise decree challenged on the ground of absence of consent—Application for review dismissed—Fresh suit, if*

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

s. 11—*concld.*

lies. Where a party to a suit applied for review of a decree passed upon a compromise on the ground that he had not consented to the compromise, and failed: *Held*, that a suit to set aside the decree on the same ground was not maintainable. *Ram Gopal v. Prasanna Kumar, 2 C. L. J. 508 : s. c. 10 C. W. N. 527*, followed. *Gulab Koer* v. *Badshah Bahadur, 10 C. L. J. 420 : s. c. 13 C. W. N. 1197*, distinguished, the relief sought in that case having been based on fraud. KAILASH CHANDRA PODDAR *v.* GOPAL CHANDRA PODDAR (1914) . . . . **18 C. W. N. 1204**

ss. 11, 15—*Service inam land—Summary settlement—Alienation—Will—Probate—Decision of Probate Court not to be destroyed by adjudication in a regular suit—Res judicata. Held*, that under section 11 of the Code of Civil Procedure it was not open to the Court, after the decision of the District Court granting probate of the will, to try the question of the authority of the widow to adopt, which question was bound up with the question of the revocation of the will in the present suit, inasmuch as the issue decided by the Probate Court had conclusively determined between the parties the question of whether or not the testator had revoked his will before death and whether the statement that he had given the authority to his widow to adopt expressed his wishes at the time of his death, and inasmuch as the District Court, which had tried the probate case, was a Court competent to have tried the present case. BRENDON *v.* SUNDARABAI (1913) **I. L. R. 38 Bom. 272**

s. 20—

See DIVORCE ACT, INDIAN (IV OF 1869), SS. 2, 4, 7 AND 45. **I. L. R. 38 Bom. 125**

s. 20 (*c*)—*Cause of action—Jurisdiction—Suit to set aside a decree on the ground of fraud—Decree obtained in Calcutta—Suit filed in Mainpuri.* The plaintiff instituted his suit in the Court of the Subordinate Judge of Mainpuri alleging that the defendants had by fraud obtained a decree against him in the High Court at Calcutta and praying that the decree might be set aside and an injunction issued restraining the defendants from executing it. *Held*, that, as the defendants resided in Calcutta and the fraud (if any) complained of had been practised there, the Mainpuri Court had no jurisdiction to entertain the suit. *Banke Behare Lal* v. *Pokhe Ram, I. L. R. 25 All. 48*, distinguished. *Read* v. *Brown, 22 Q. B. D. 128*, and *Umrao Singh* v. *Hardeo, I. L. R. 29 All. 418*, referred to. DAN DAYAL *v.* MUNNA LAL (1914) . **I. L. R. 36 All. 564**

ss. 24, 92—

See JURISDICTION. **I. L. R. 41 Calc. 866**

s. 34; O. XXXIV, rr. 2, 4—*Mortgage—Preliminary decree on mortgage—Interest—*

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

s. 34—*concld.*

Discretion of Court. Unless for some legal reason it sees fit to interfere with the contract as to the rate of interest, a Court passing a preliminary decree in a mortgage suit under Order XXXIV, rule 2, of the Code of Civil Procedure (1908), has no power to award interest at other than the contractual rate up to the date fixed for payment. RAJWANTA KUNWAR *v.* SHIAM NARAIN SINGH (1914) . . . . **I. L. R. 36 All. 220**

s. 37—

See CIVIL COURTS ACT (XIV OF 1869), S. 32 . . **I. L. R. 38 Bom. 662**

ss. 37, 38 and 150—*Jurisdiction to execute decree—Pending execution proceedings—Transfer of property sought to be sold to the jurisdiction of another Court—Res judicata in execution proceedings—Ex parte order passed after notice, effect of—Objection petition, when can be treated as application to set aside ex parte order—Order IX, rule 13, application of.* Where, after attachment of property in execution of a decree for money and an order for sale made by the Court which passed the decree, the property was transferred to the local limits of the jurisdiction of another Court, newly established: *Held*, that the Court which passed the decree ceased to have jurisdiction to continue the execution proceedings, and that the new Court, having territorial jurisdiction over the property attached, was the proper Court to entertain an application for execution, by the sale of the property, and pass orders thereon. In such a case no formal order of transfer of a particular case or of all pending cases is necessary. On principle, unless the authority which changes the venue reserves the right to the Court which has lost the jurisdiction to continue pending proceedings affecting the property so transferred to another jurisdiction, such proceedings are also *ipso facto* transferred by the change of venue to the new Court, the records relating to that action becoming part of the records of the new Court. Section 150, Civil Procedure Code, implies that the whole business of a Court might be transferred to another Court, without any order of transfer by a superior Court under s. 24, or any other section of Code, thereby adopting the Calcutta view, that by changes of venue made by the local Government, the business of a Court which loses jurisdiction over a certain area, so far as such area is concerned, will be *ipso facto* transferred to the new Court. The case law on the question considered. An *ex parte* order in execution proceedings passed after issue of notice and after the Court has held that the service of the notice was duly effected is, on general principles, binding as *res judicata. Mungal Pershad Dichit* v. *Grija Kant Lahiri, I. L. R. 8 Calc. 51*, followed. Order IX, rule 13, Civil Procedure Code, applies to *ex parte* orders in execution, and unless they are set aside by application under Order IX, rule 13, or by appeal, they cannot be

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

——— **s. 37**—*concld.*

questioned in the further stages of execution proceedings. An objection-statement which is not stamped, which contains no prayer to set aside the order, and which does not show when the objector had notice of the order, cannot be treated as an application to set aside the *ex parte* order. *Mochai Mandal* v. *Meseruddin Mollah, 13 C. L. J. 26,* distinguished. SUBBIAH NAICKER *v.* RAMANATHAN CHETTIAR (1914) . **I. L. R. 37 Mad. 462**

——— **ss. 38, 39, 41 and 50 ; O. XXI, rr. 16 and 26**—*Execution Application—Application to Court which passed the decree after transfer thereof to another Court for execution, whether according to law and to the proper Court—Limitation Act (IX of 1908), Art. 182.* On the application of a decree-holder the Court at Vizagapatam which passed the decree sent it for execution to the Court at Parvatipur which after attaching certain properties dismissed the execution application on 10th March 1905. On 13th December 1907, the decree-holder again applied to the Court at Vizagapatam for sale of the attached properties, and the application was simply recorded. The present application for execution was made to the Vizagapatam Court on 21st April 1910, for attachment and sale of certain properties. *Held,* that the application was barred as the application of the 13th December 1907, though a step in aid of execution [see *Pachiappa Achari* v. *Poojali Seenan, I. L. R. 28 Mad. 577*], was not made to the proper Court, and hence could not serve limitation. The Court to which a decree is sent for execution is the only Court which has seizin of the execution proceedings, and it retains its jurisdiction to execute the decree till it certifies under s. 41, Civil Procedure Code, to the Court which passed the decree, the fact of execution, or if it fails to execute the decree, the circumstances attending such failure. In such a case the Court which passed the decree has no jurisdiction to entertain an execution application unless concurrent execution has been ordered or proceedings in the Court to which the decree was sent had been stayed for the purpose of executing the decree in the former Court. *Abda Begam* v. *Muzaffar Husen Khan, I. L. R. 20 All. 129,* followed. *Saroda Prosad Mullick* v. *Luchmeeput Sing Doogor, 14 Moo. I. A. 529, 540,* and *Kristokishore Dutt* v. *Rooplal Dass, I. L. R. 8 Calc. 687,* distinguished. MAHARAJA OF BOBBILI *v.* NARASARAJU PEDA BALIAR SIMHULU (1914) . **I. L. R. 37 Mad. 231**

——— **s. 47**—

1. ——— *Decree irreconcilable, directions in—Decree impossible of execution—Claim on behalf of Deity—Appeal.* The appellant obtained a decree on a mortgage executed by one *G* and had certain properties attached. Thereafter one *Y* brought a suit for declaration that the property was *wakf* and could not therefore be attached and sold and obtained a decree. On appeal to the High Court against this decree, *G* and one

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

——— **s. 47**—*contd.*

N were substituted as the heirs of *Y* who had died in the meantime, and the appeal was ultimately dismissed as against *G* and decreed on a compromise as between the appellant and *N*, "allowing the appellant to recover the money due to him by sale of 4 annas share of the properties." On an application for execution of this decree of the High Court without making *G* a party to the execution, *G* appeared and objected that he was the sole mutwalli of the property which was *wakf* and could not be sold in execution of the decree. The lower Appellate Court refused execution, holding that a suit for declaration could not legally terminate in a mortgage-decree and that the decree which could be executed was the original mortgage-decree, but not the compromise decree. *Held,* that as *G* was a party to the suit in his personal capacity as also as mutwalli his objection came within s. 47 of the Civil Procedure Code and an appeal lay from the order refusing to execute the decree. *Kartik Chandra Ghose* v. *Ashutosh Dhara, I. L. R. 39 Calc. 298 ; 16 C. W. N. 26,* distinguished. That the ground upon which the application for execution was refused was erroneous ; the decree of the High Court in the present case was, however, incapable of execution inasmuch as the decree in so far as it dismissed the appeal as against *G* as a part representative of the former mutwalli was a final decision, that the property was *wakf* and inalienable, and a direction in the same decree that a portion of the property could be sold was irreconcilable with the rest of the decision and made it impossible to carry the whole decree into effect. KALI PRASANNO GHOSH *v.* GOLAM RAHMAN (1913) **18 C. W. N. 910**

2. ——— *Execution started against deceased judgment-debtor—Sale, if may be set aside—Purchaser of occupancy-holding, if may apply—Limitation—Fraud—Abuse of processes of Court—Onus—Bengal Tenancy Act (VIII of 1885), s. 153, if bars second appeal in application to set aside sale—Practice—Revision-application treated as appeal.* Where proceedings to execute a decree for rent obtained against an occupany-raiyat having been started more than a year after the judgment-debtor's death, writ of attachment and proclamation of sale were issued in his name and returns were filed that processes had been duly served and thereafter at the sale at which no bidders attended the property was purchased by the decree-holder who, on 8th April 1912, got delivery of possession through Court, and within one month thereof the petitioner who had previously purchased the holding from the tenant applied to have the sale set aside. *Held,* that the execution proceedings were liable to be set aside on the ground of grave irregularity. *Quære :* Whether the irregularity was such as rendered the sale absolutely void or voidable only. *Held,* also, that the application came within s. 47 of the Civil Procedure Code and was not time-barred, s. 18 of the Limita-

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

——— **s. 47**—*concld.*

tion Act being applicable in the circumstances of the case. *Livinia Ashton* v. *Madhabmoni Dasi, 11 C. L. J. 489 : s. c. 14 C. W. N. 560*, referred to. *Malkarjun* v. *Narahari, L. R. 27 I. A. 216 : s. c. I. L. R. 25 Bom. 337, Stowell* v. *Ajudhia Nath, I. L. R. 6 All. 255, Sheo Prasad* v. *Hira Lal, I. L. R. 12 All. 440*, distinguished. That it was for the decree-holder to show that the petitioner had on any date earlier than 8th April 1912 knowledge of the sale. That the petitioner from whom rent was received though he might not have been formally registered as a tenant, had *locus standi* to apply under s. 47 to set aside the sale, although he had failed to prove that the holding was transferable by custom. *Prosunno Kumar* v. *Bama Churn, 13 C. W. N. 652*, distinguished. That a second appeal lay in the case although the claim in the suit for rent was under Rs. 100. The explanation added to s. 153 of the Bengal Tenancy Act by the Amending Act of 1907 has not completely nullified the Full Bench decision in *Kali Mandal* v. *Ram Sarbeswar, I. L. R. 32 Calc. 957 : s. c. 9 C. W. N. 721.* In this case no question of limitation or court-fees arising, the petitioner's application for revision was treated as a memorandum of appeal. ARJUN DASS *v.* GUNENDRA NATH BASU-MULLICK (1914) **18 C. W. N. 1266**

——— **s. 48 ; O. XX, r. 6**—*Mortgage decree—Direction that unrealized balance of decree should be recovered from mortgagor personally—Application to execute, if may be made after 12 years.* Where a mortgage decree directed that the property mortgaged should be sold and, if the proceeds of the sale be insufficient, the balance of the decree should be realized from the other properties and the person of the judgment-debtor, an application made more than 12 years after the date of the decree for attachment and sale of the mortgagor's other properties is barred by s. 48 of the Civil Procedure Code. JNANDRANATH BOSE *v.* KHULNA LOAN COMPANY, LIMITED (1913) **18 C. W. N. 492**

——— **s. 55** (*4*)—

See EXECUTION OF DECREE.

I. L. R. 41 Calc. 50

——— **s. 60, cl.** (*2*) (*b*)—*Army Act, 1881 (44 & 45 Vict., c. 58), ss. 136 and 190, sub-sec. 8, as amended by Army Annual Act, 1895 (58 & 59 Vict., c. 7), s. 4—Officer on the Indian Staff Corps—Money decree—Execution—Salary not liable to attachment.* Messrs. K. K. & Co. filed a suit and obtained a decree for a sum of money against Major D., an officer in the Indian Army. They subsequently attached a moiety of that officer's pay under Order XXI, rule 48, of the Civil Procedure Code, and in pursuance of such attachment the Deputy Controller of Military Accounts remitted such moiety to the Sheriff of Bombay who had paid out a portion of the moneys received by him under Messrs. K. K. & Co.'s attachment and had in his hands a further sum which in the ordinary course would

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

——— **s. 60**—*concld.*

have been paid out likewise, when Major D. took out a summons calling on the plaintiffs to show cause why their attachment should not be raised and the sums recovered thereunder refunded. *Held*, that Major D., under s. 190, sub-sec. 8, of the Army Act, 1881, was an officer of His Majesty's Regular Forces, and under s. 136 of the Army Act, 1881, and s. 60 of the Code of Civil Procedure he was entitled to receive his pay without any deduction and that the attachment must be raised and that the Sheriff must pay to Major D. the sum received by him under the attachment and not yet paid away. *Velchand* v. *Bourchier, I. L. R. 37 Bom. 26*, applied. *Held*, however, that, as the moneys actually paid out to the execution creditors had not been paid out under coercion or under a mistake of fact, though possibly under a mistake of law, Major D. was not entitled to a refund of such moneys. KING, KING & Co. *v.* MAJOR DAVIDSON (1914) . . **I. L. R. 38 Bom. 667**

——— **ss. 68, 70, r. 14 ; O. XXI, r. 101**—*Decree—Execution by Collector—Court functus officio for the time being—Exhaustion of all the power conferred upon the Collector for execution—Matters requiring to be done in execution must be done by the Court which passed the decree.* After a decree has been transferred to a Collector for execution, the Court which passed that decree is for the time being *functus officio* for all purposes of execution ; but as soon as the Collector has exhausted all the power of execution conferred upon him by rule 14 framed under s. 70 of the Civil Procedure Code (Act V of 1908), then any matters requiring to be done, and usually regarded as in execution, must be done by the Court which made the decree. *Pita v. Chunilal, I. L. R. 31 Bom. 207*, referred to. ARJUNA BIN RAGHU *v.* KRISHNAJI (1914) **I. L. R. 38 Bom. 673**

——— **s. 80**—[*Old Code (Act XIV of 1882), s. 424*]—*Notice of suit against Secretary of State—Notice not restricted to suits for damages for an act done.* Under s. 424 of the Civil Procedure Code (Act XIV of 1882) [corresponding to s. 80, Code of Civil Procedure (Act V of 1908)], notice is necessary in all suits of whatever description against the Secretary of State for India in Council. SECRETARY OF STATE *v.* KALEKHAN (1914) **I. L. R. 37 Mad. 113**

——— **s. 80 ; O. VII, r. 11** (*d*)—*Secretary of State for India in Council, suit against—Notice to "Collector" means notice to Collector of District in which suit instituted—Suit for damages for breach of contract, notice if necessary of.* The notice contemplated in s. 80 of the Civil Procedure Code must be served on the Collector or one of the Collectors of the District in which the suit is to be brought. A suit brought in the Court at Sealdah, after notice served on the Collector of Purneah, is not in compliance with s. 80, Civil Procedure Code. Such a notice is required even in a case arising out of a contract. *Manindra Chandra*

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

——— **s. 80**—*concld.*

Nandi v. *Secretary of State, 5 C. L. J. 148,* followed. *Secretary of State* v. *Rajlucki, I. L. R. 25 Calc. 239,* referred to. RATAN CHAND DHARAM CHAND *v.* SECRETARY OF STATE FOR INDIA (1914) **18 C. W. N. 1340**

——— **s. 92**—

See PUBLIC RELIGIOUS TRUST. **I. L. R. 41 Calc. 749**

1. ——— *Religious Endowments Act (XX of 1863), s. 18—Option to proceed under either so far as reliefs common are prayed for—Collector's sanction for removal of trustee given in 1908, good for suit for removal after coming into force of Civil Procedure Code (Act V of 1908).* A suit instituted with the consent of the Collector is a good suit for all reliefs referred to in s. 92 of Civil Procedure Code (Act V of 1908). Section 92, Civil Procedure Code, and s. 14 of Act XX of 1863, so far as the forms of relief to which they relate are the same, offer a choice to persons interested in the trust, who may proceed under either; they are not bound to proceed under both. The consent of the Collector given in November 1908, *i.e.*, before the Civil Procedure Code came into force, is a valid consent for the institution of a suit for the removal of a trustee though at the time the consent was given a suit for removal could not be instituted under the law then in force. VENKATARANGA CHARLU *v.* KRISHNAMA CHARLU (1914) **I. L. R. 37 Mad. 184**

2. ——— *Suit to remove mutwalli of mosque—Compromise by which plaintiff agrees to withdraw suit for consideration, whether lawful—Compromise if may be recorded before question whether endowment public or private decided.* In a suit instituted under s. 92, Civil Procedure Code, on the allegation that the defendant (the *mutwalli* of two mosques) had misappropriated certain property dedicated for their upkeep and praying, *inter alia*, that the defendant might be removed from the *mutwalliship* and a new *mutwalli* appointed and a scheme for the proper discharge of the trust framed, the parties entered into a compromise, whereby the plaintiffs agreed to withdraw from the suit in consideration of certain advantages to be received by them, but the Court refused to record the compromise and pass a decree on its basis. On appeal, *held*, that the question whether the agreement of compromise was a lawful one depended on the further question whether the endowment in suit was a public endowment or not, and until that question was decided, it could not be said to be proved to the satisfaction of the Court that the suit had been adjusted by lawful agreement. *Gyananda* v. *Kristo Chandra, 8 C. W. N. 404,* referred to. AHMED KHAN *v.* ABDUS SOBHAN CHOUDRY (1913) **18 C. W. N. 1264**

——— **s. 96** (*1*)—

See LAND ACQUISITION ACT (I OF 1894), s. 54 . . **I. L. R. 38 Bom. 337**

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

——— **s. 96**—*concld.*

——— ——— **ss. 96 and 97**—*Partition—Appeal—Passing of final decree no bar to the hearing of an appeal against the preliminary decree.* When an appeal has once been filed and is pending against the preliminary decree in a suit for partition, the passing of a final decree does not render the appeal nugatory. The final decree depends upon the preliminary decree, and if, as the result of an appeal, the latter is set aside, the former must fall with it. *Kuriya Mal* v. *Bishambhar Nath, I. L. R. 32 All. 225,* overruled. *Khirodamoyi Dasi* v. *Adhar Chandra Ghose, 18 C. L. J. 321,* dissented from. *Muhammad Akhtar Husain Khan* v. *Tassadduq Hussain, I. L. R. 34 All. 493,* and *Lukshmi* v. *Maru Devi, I. L. R. 37 Mad. 29,* followed. *Abdul Jalil* v. *Amar Chand Paul, 18 C. L. J. 223,* referred to. KANHAIYA LAL *v.* TIRBENI SAHAI (1914) . **I. L. R. 36 All. 532**

——— **s. 97**—*Preliminary decree—Appeal—Findings on preliminary issues—No appeal lies from findings—Decree, drawing up of—Duty to draw up decree is of the Court—Civil Circulars (1912), cl. 159.* In a suit for accounts, the first Court recorded findings on certain preliminary issues and ordered accounts to be taken on the basis of those findings. No preliminary decree was drawn up by the Court and none was asked for by the plaintiff's pleader. The accounts were next taken by a commissioner and a decree was passed in accordance with his report, dismissing the suit. The plaintiff appealed against the final decree and urged objections against finding on preliminary issues. *Held*, that the plaintiff was not barred of his right to urge objections against the findings on preliminary issues, for under the Civil Procedure Code (Act V of 1908), s. 97, his right to appeal arose only when there was a decree based on those findings. That the practice in the mofussil Courts was in accordance with the provisions of the Civil Procedure Code and Civil Circulars, cl. 159, *viz.*, that the Court was to draw up the decree, and that the pleaders, if any, in the case were to see that it was in accordance with the judgment. There is no provision requiring a party or his pleader to move the Court to draw up a decree, and mere omission to ask the Court to do that which it is the duty of the Court to do on its own motion cannot affect his right to appeal. KALURAM PIRCHAND *v.* GANGARAM SAKHARAM (1913) . . **I. L. R. 38 Bom. 331**

——— ——— **s. 98**—*High Court Judges, difference between—Practice as to reference to third judge, change of—Case to be conditionally decided and point only to be referred.* JENKINS, C. J. The intention of s. 98 of the Civil Procedure Code is that the Judges hearing the appeal should come to a complete decision with the reservation on the point of law on which they differ, and they should by their judgments make it clear that if the point of law is decided in one way it will have a certain final result, and if it is decided in another way it will

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

——— **s. 98**—*concld.*

have another and a different final result. GAUHAR ALI *v.* SAMIRUDDIN SHEIKH (1913) **18 C. W. N. 33**

——— **ss. 99, 107** (*1*) (*b*) ; **O. XLI, r. 23.**

See REMAND . . **I. L. R. 41 Calc. 708**

——— **s. 100**—*Second appeal—Finding of fact—Land tenures in Kumaun—Custom—Pasture land—Grant of pasture land disputed.* According to the special law relating to land tenures in Kumaun, land which was not allotted to villagers for purposes of cultivation was held to belong to the Government and might be granted to individual villagers for cultivation or the planting of trees. But if such land were *gauchar*, or pasture land, a grant could only be made if it was not inconsistent with the general wishes and well-being of the village community : and it was open to any villager to bring a suit to dispute the validity of such grant. *Held*, on such a suit being filed, that the finding of the Appellate Court that the grant in question was inconsistent with the general wishes and well-being of the community was a finding of fact and could not be disturbed in second appeal. GITA RAM *v.* KIRPA RAM (1914) **I. L. R. 36 All. 256**

——— **s. 104** (*f*)—*Arbitration without intervention of Court—Award—Order filing award, if appealable after decree in accordance with award.* An appeal lies against an order filing an award made upon an arbitration without the intervention of the Court even after a decree is passed upon the award. The decree based upon the award is no doubt final if it is in accordance with the award, but the validity of the decree depends upon the validity of the order directing the award to be filed and if the latter is set aside, the decree must be declared inoperative. KHETTRA NATH GANGOPADHYAY *v.* USHABALA DASI (1914) **18 C. W. N. 381**

——— **s. 104 ; O. XLIII, r. 10** (*a*)—*Order of Appellate Court returning plaint for presentation to proper Court—Appeal—Suits Valuation Act (VII of 1887), s. 11. Held*, that an appeal lies, under the Code of Civil Procedure, 1908, as it did under the former Code, from an order returning a plaint to be presented to the Court. *Wahidullah* v. *Kanhaya Lal, I. L. R. 25 All. 174*, followed. Where, however, such an order is to be made by an Appellate Court, it is the duty of such Court first to consider whether the over-valuation or under-valuation of the suit has prejudicially affected its disposal on the merits and thereafter to take action in the manner prescribed by s. 11 of the Suits Valuation Act, 1887. DALIP SINGH *v.* KUNDAN SINGH (1913) . **I. L. R. 36 All. 58**

——— **ss. 107, 149 ; O. VII, r. 11, cl.** (*c*)—*Memorandum of appeal insufficiently stamped—Presenting the memorandum of appeal on the last day for filing—Court must give time for paying up deficiency.* A memorandum of appeal which required a court-fee stamp of Rs. 205 was stamped with an eight annas stamp and was filed in Court, on the last day allowed by the law of limitation. The pleader on being questioned stated that he had no funds with which to pay the requisite stamp and requested the Court to give him time for making the necessary payment. The Court refused to grant the time applied for and rejected the memorandum of appeal. The plaintiff having appealed : *Held*, reversing the order, that the lower Court was in error in rejecting the memorandum of appeal, and that it ought to have granted time within which to supply the requisite stamp. ACHUT RAMCHANDRA *v.* NAGAPPA BAB BALGYA (1913) . . . . **I. L. R. 38 Bom. 41**

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

——— **s. 107**—*concld.*

——— **ss. 109, 110**—*Leave to appeal to Privy Council—Final order—Interlocutory order—Order rejecting an application for bringng on record the legal representatives of a deceased party to a pending appeal—Amended Letters Patent, cl. 39.* The applicant, claiming to be the legal representative of a deceased party to a pending appeal, applied to have his name brought on the record. The High Court disallowed the application and ordered the names of the heirs of the deceased to be substituted. The applicant applied for leave to appeal to His Majesty in Council from the order rejecting the application. *Held*, that the order having been passed on an application in a pending appeal was not a final, but an interlocutory, order ; and that no appeal lay from it to His Majesty in Council under the provisions of cl. 39 of the Amended Letters Patent. GANGAPPA REVANSHIDAPPA *v.* GANGAPPA MALLESHAPPA (1914) **I. L. R. 38 Bom. 421**

——— **ss. 109 and 110 ; O. XLI, r. 10**—*Dismissal of appeal for default in furnishing security for costs.—Application for leave to appeal to His Majesty in Council—"Substantial question of law." Held*, that an order dismissing an appeal for default in furnishing security for costs under Order XLI, rule 10, of the Code of Civil Procedure, 1908, is not a fit subject for the grant of a certificate under s. 109 (*c*) of the Code. MUHAMMAD ABDUL GHAFUR KHAN *v.* THE SECRETARY OF STATE FOR INDIA (1914). **I. L. R. 36 All. 325**

——— **s. 115**—

See APPEAL . **I. L. R. 41 Calc. 323**

See PRACTICE . **I. L. R. 41 Calc. 632**

See SONTHAL PARGANAS. **I. L. R. 41 Calc. 876**

——— *Revision by High Court when error of law committed by lower Court—Contribution, meaning of—Suit for contribution, what is—Suit of the value of less than Rs. 500 cognisable by a Court of Small Causes, appeal in—Decree for rent obtained by co-sharer landlord against tenants—Deposit of decretal amount by purchaser from one of the tenants to prevent sale—Right of such depositor to be reimbursed—Provincial Small Cause Courts Act (XV of 1882),*

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

——— **s. 115**—*concld.*

Art. 41, Sch. II—Indian Contract Act (IX of 1872), ss. 69, 70. The plaintiffs purchased the interest of one of the defendants in a tenancy held by them all. Some out of the entire body of landlords who claimed a half share in the superior tenancy obtained a decree for rent and in execution thereof were about to bring the property to sale when the plaintiffs deposited in Court the necessary amount in satisfaction of the decree. The plaintiffs brought an action for declaration that the defendants were liable to pay the judgment-debt and they themselves had paid the money under circumstances which entitled them in equity to recover the same from the defendants. The suit was described as one for contribution. The lower Courts dismissed the plaintiffs' claim on the ground that as the decree had been obtained by co-sharer landlords, the interest of the plaintiffs in the tenancy was not in jeopardy and the payment made by them must consequently be deemed voluntary. The plaintiffs appealed to the High Court. *Held*, that contribution signifies payment by each of the parties interested of his share in any common liability. Consequently an action for contribution is a suit brought by one of such parties who has discharged the liability common to them all to compel the others to make good their shares. That the suit as framed could not be deemed a suit for contribution: it was really a suit by the plaintiffs for recovery of money paid by them for the benefit of the defendants. That Art. 41 of the Second Schedule to the Provincial Small Cause Courts Act does not cover the present case. The suit was clearly one of a nature cognizable by a Court of Small Causes and as the sum claimed was less than Rs. 500, the appeal was incompetent under s. 102, Civil Procedure Code, and must be dismissed. That the view taken by the lower Courts that the payment made by the plaintiffs was voluntary, as the decree for rent was obtained by co-sharer landlords who could not have executed it so as to prejudice the interest of the plaintiffs, was erroneous. The question of the precise effect of a sale in these circumstances would at any rate be a matter for controversy and the party liable to be affected would consequently be entitled to satisfy the decree to protect himself from the apprehended injury to his right; he would also be entitled if he made the payment to be reimbursed under s. 69 or s. 70 of the Indian Contract Act. *Held*, however, as to the application of the plaintiffs for the memorandum of appeal being treated as an application for revision, that the error committed by the lower Court being one of law and not affecting the jurisdiction of the Court, the High Court could not interfere in the exercise of its revisional powers. SATYA BHUSAN BANERJEE *v.* KRISHNA KALI BANERJEE (1914) . . **18 C. W. N. 1308**

——— **s. 115, Sch. II, para. 15**—

See ARBITRATION. **I. L. R. 36 All. 354**

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

——— **ss. 115 and 151**—*Money-lender and debtor—Arbitrator's award—Decree without inquiry into the nature of the award—Manual of High Courts' Circulars, Chapter VI, para. 2—Inquiry—Real point of difference—Decree set aside—Abuse of judicial process.* The plaintiff, a money-lender, filed in Court an arbitrator's award passed against the defendant-debtor and prayed for a decree in the terms of the award. The Court having presumed that there was a real point of difference between the parties, passed a decree in the terms of the award without instituting inquiry directed by a circular of the High Court (Manual of High Courts' Circulars, Chapter VI, para. 2, page 181). *Held*, setting aside the decree under s. 115 and 151 of the Civil Procedure Code (Act V of 1908), that there was an abuse of judicial process. VELCHAND CHHAGANLAL *v.* LIEUT. LISTON (1914)
I. L. R. 38 Bom. 638

——— **s. 141; O. IX, r. 13**—

See EXECUTION PROCEEDINGS.
I. L. R. 41 Calc. 1

——— **ss. 144 and 151**—*Execution-sale set aside on ground of decree-holder and auction-purchaser's fraud—Auction-purchaser if may be directed to make over profits realised without suit—Restitution.* Where a sale in execution of a decree is set aside at the instance of the judgment-debtor on the ground of fraud on the part of the decree-holder as well as of the auction-purchaser: *Held*, that the Court in setting aside the sale can, in the exercise of its powers under s. 151 of the Civil Procedure Code, direct the auction-purchaser to make over to the judgment-debtor the profits he realised from the property, having got hold of the property by an abuse of the Court's process. *Quære:* Whether the case falls within s. 144 of the Code. *Beni Madho Singh* v. *Pran Singh, 15 C. L. J. 187*, followed. *Safaraddi* v. *Durga Prosad Sen, 16 C. L. J. 83*, referred to. AMIRANNESSA CHOWDHURANI *v.* KURIMANNESSA CHOWDHURANI (1914) . . . **18 C. W. N. 1299**

——— **s. 148; O. IX, r. 13**—*Decree, ex parte—Conditional order setting aside decree—Condition not fulfilled—Court competent either to extend time for compliance with condition or to pass a fresh conditional order.* On an application to set aside an *ex parte* decree the Court passed an order in favour of the applicants, but conditional on their paying to the plaintiff by a certain date a sum of money as damages. This condition was not fulfilled, and the Court, holding that it had no jurisdiction to receive the prescribed payment after the date fixed, disallowed the defendants' application to set aside the decree. *Held*, (i) that an appeal lay from this order, and (ii) that the Court below had jurisdiction to extend the time for payment of the damages or to pass a fresh conditional order setting aside the decree upon terms, the original order having become inoperative. *Suranjan Singh* v. *Ram Bahal Lal, I. L. R. 35 All. 582*,

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

——— **s. 148**—*concld.*

distinguished. JAGARNATH SAHI *v.* KAMTA PRASAD UPADHYA (1913) **I. L. R. 36 All. 77**

——— **ss. 151, 152**—*Decree in apparent conformity with judgment—True intention of Court as to costs awarded to successful party, whether against one or more defendant, as gathered from whole judgment, if may be given effect to, by way of amendment—Review application, if only remedy.* Where one only of several defendants contested the suit which was decreed in favour of the plaintiffs, and from the judgment, as a whole, it appeared that the Court intended to make defendant No. 1 alone liable for the costs and not the other defendants, but in concluding its judgment it said: "the suit be decreed with costs": *Held*, that this portion of the judgment was elliptical and ambiguous, and the true intention of the Court was to be gathered from the judgment as a whole, and the decree of the Court which following the concluding portion of the judgment awarded costs against all the defendants was not really in accord with the true intention of the Court. That the defect in the decree could be amended under either s. 151 or s. 152 of the Civil Procedure Code, and an application for review of judgment was not the only remedy of the other defendants. *Brij Ratan* v. *Jay Narain, I. L. R. 37 Calc. 649, 659. In re Swire, 30 Ch. D. 239*, referred to. Such an amendment could be made even after an appeal had been lodged from the decree. *E.* v. *E.* [*1903*], *P. 88*, followed. BARHAMDEO SINGH *v.* HARMANOGE SINGH (1913) **18 C. W. N. 772**

——— **O. 1, r. 3**—*Parties—Misjoinder—Suit by reversioner for possession—Other reversioners and transferees from widow joined as defendants. Held*, that it was competent to a reversioner suing for possession of immoveable property after the death of a Hindu widow to join as defendants both other reversioners in possession of the property claimed and also transferees of such property from the widow, and the suit was not bad for multifariousness. *Parbati Kunwar* v. *Mahmud Fatima, I. L. R. 29 All. 267, Kubra Jan* v. *Ram Bali, I. L. R. 30 All. 560*, and *Ganeshi Lal* v. *Khairati Singh, I. L. R. 16 All. 279*, referred to. BAL KRISHNA DAS *v.* HIRA LAL BAGLA (1914) **I. L. R. 36 All. 406**

——— **O. II, r. 2**—

See CAUSE OF ACTION.
I. L. R. 41 Calc. 825

1. ——— *Landlord and tenant—Lease—Landlord to recover possession on tenants' failure to pay rent—Suit by landlord to recover possession on tenants' failure—Decree directing plaintiff to recover possession on tenants' failure to pay rent within three months—Defendants' failure and recovery of possessions by plaintiff—Prayer in the plaint for reservation of leave to bring a suit for rent not granted—Subsequent suit by the plaintiff to recover rent—Subsequent suit barred.* A lease provided that on the tenants' failure to pay rent, the landlord should be entitled to take possession of the lands. The tenants having failed to pay the rent of two years, the landlord sued them and obtained a decree which directed that on the defendants' default to pay all the arrears of rent and costs within three months, the plaintiff should take possession of the lands. In the said suit the plaintiff had asked for permission to bring a separate suit for the rent in arrears for two years, but none was given. Subsequently the plaintiff having brought a suit for the said rent of two years: *Held*, that the suit was barred under Order II, rule 2, of the Civil Procedure Code (Act V of 1908) as the claim in the suit for rent up to the date of forfeiture arose upon the same contract as did the landlord's right of forfeiture for non-payment of rent; that no necessity or reason existed for a separate suit for rent where there had been a forfeiture or non-payment and that the claim for possession and the claim for rent ought to be enforced in one suit, provided the cause of action was the same, unless the Court should give leave for the reservation of one of the remedies. KASHINATH RAMCHANDRA *v.* NATHOO KESHAV (1914) **I. L. R. 38 Bom. 44**

2. ——— *Cause of action—Hundi given in discharge of debt on accounts—Failure of suit on hundi—Subsequent suit based on the accounts.* A debtor gave his creditor a *hundi* for the amount of his debt. The creditor accepted the *hundi*, but the debtor failed to pay it at maturity. The creditor then sued the debtor on his *hundi*, but failed to recover. *Held*, that this was no bar to his suing on the accounts to recover the debt. The cause of action on the *hundi* was totally distinct from the cause of action in respect of the original debt. *Preonath Mukerji* v. *Bishnath Prasad, I. L. R. 29 All. 256*, doubted. *Payana Reena Layana Saminathan Chetty* v. *Pana Lana Palaniappa Chetty, 18 C. W. N. 617*, referred to. BENI RAM *v.* RAM CHANDAR (1914) **I. L. R. 36 All. 560**

3. ——— *Causes of action different, though claim same—Agreement admitting liability and prescribing payment by promissory notes—Promissory notes, materially altered—Suit on promissory notes dismissed—Suit upon agreement, if lies—"Accord and satisfaction by substituted agreement"—Claim on prior rights extinguished—Suit on such claim, if lies—Ceylon Civil Procedure Act, s. 34* (*cf. Civil Procedure Code, O. II, r. 2*)*—Pleadings, faulty—Claim in plaint based on wrong grounds—No objection by defendant—Amendment.* *A*, whose claim to receive certain items of moneys from *B* was disputed by the latter, agreed with *B* to refer the disputes to arbitrators who, after an informally conducted investigation, drew up what was termed a "receipt," which *B* signed, the arbitrators witnessed and *A* accepted and acted upon. The document dealt *seriatim* with seven sums thereby admitted to be due from *B* to *A*, amounting

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

———— **O. II, r. 2**—*contd.*

in all to Rs. 28,224 odd and prescribed the mode in which it was to be paid, namely, by a cash payment of Rs. 224 odd (which was immediately paid) and by passing two promissory notes for Rs. 14,000 each "payable with interest" on two dates. The amount of interest was (probably by oversight) not specified, but there was no doubt that the parties intended that it would be at a certain customary rate which worked out to between 6 and 7 per cent. per annum. *A*, however, subsequently, and without communication with *B*, went to one of the arbitrators and (without bad faith either on his part or the arbitrator's) persuaded him to alter both promissory notes by inserting therein 9 per cent. as the rate of interest. *A*'s action on the two promissory notes having been dismissed on the ground of material alteration, he sued *B* for two items of moneys amounting to Rs. 12,297 odd which he had claimed before the arbitrators and which were included in their award. *Held*, that the "receipt" constituted the award of the arbitrators. That whether it did or did not amount to an award it was clearly an "accord and satisfaction by a substituted agreement" whereby the respective rights of the parties *inter se* were abandoned in consideration of the acceptance by all of a new agreement. That the arrangement for the discharge of the unpaid balance of the amount found due by means of the promissory notes only expressed the mode of payment, which was essentially a matter of form only, the substance of the award being that the specified amount was actually due; the plaintiff could, therefore, sue for the balance due upon the agreement when his action on the promissory notes failed. That the form of the plaintiff's action which was based on rights already extinguished by the agreement was faulty. But the present action should be treated as one based on the new agreement, the defendant not having taken exception to plaintiff's statement of the grounds of his claim, so as to give him an opportunity to amend them at an earlier stage. That a claim on the promissory notes and a claim for the amount found due under the award were not the same cause of action, but were really inconsistent and mutually exclusive causes of action, and the plaintiff was not required in his suit on the promissory notes to ask for relief on the cause of action arising out of the agreement, by s. 34 of the Ceylon Civil Procedure Act. That the plaintiff's suit which was for a part only of the unpaid balance should be decreed. But he would be precluded by s. 34 of the Ceylon Civil Procedure Act from bringing a fresh action for the remainder. The object and meaning of s. 34 of the Ceylon Civil Procedure Act (which is very similar to O. II, r. 2, of the Indian Code) explained. This section is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action different causes of action, even though they arise from the same

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

———— **O. II, r. 2**—*concld.*

transactions. The first part of the clause makes it incumbent on the plaintiff to include the whole of his claim in the action. The second portion makes it incumbent on him to ask for the whole of his remedies. The final paragraph (*Explanation* in the Indian Code) is not intended to be an illustration of the foregoing provisions, but a substantive enactment making what otherwise would be independent causes of action, one cause of action for the purposes of the section. SAMINATHAN CHETTY *v.* PALANIAPPA CHETTY (1913)

18 C. W. N. 617

4. ———— **O. II, r. 2 ; O. XXXIV, r. 14**—*Procedure—Suit by mortgagee for simple money decree—Subsequent suit for sale on mortgage not barred—Res judicata—Limitation—Acknowledgment.* Certain mortgagees sued for a simple money decree in respect of their mortgage debt, stating that they had relinquished their claim under their mortgage, and obtained a decree as prayed. The decree in this suit stated that "the plaintiff would not be entitled to bring to sale the property mortgaged in the bond sued on." As, however, this decree was not satisfied, the plaintiffs-mortgagees proceeded to put their mortgage into Court and prayed for a decree for sale on it. *Held*, that the former proceedings were no bar to the present suit. INDARPAL SINGH *v.* MEWA LAL (1914)

I. L. R. 36 All. 264

———— **O. II, r. 5**—*Misjoinder of causes of action—Hindu family, position of surviving members of joint and undivided, not heirs of deceased member—Joinder of claim by widow of deceased member of joint and undivided Hindu family for maintenance against the property in which the deceased member was a co-parcener at the date of his death with claims against the surviving co-parceners for her stridhan ornaments.* Members of a joint and undivided Hindu family hold the family estate jointly and are seized of it "*per my et per tout.*" On the death of a co-parcener of a joint Hindu family his share and interest in the family property is automatically absorbed and the surviving co-parceners become the full owners of the whole estate. Such co-parceners are not the heirs of the deceased but inherit by survivorship and become the owners of the interest of the deceased in the family estate as co-owners in their own right and by the legal extinction of the interest of the deceased co-parcener by reason of his death. The claim of the widow of such a deceased co-parcener for maintenance is clearly not against "the estate of the deceased" husband, but is against the property of which he was a co-parcener at the time of his death. Accordingly there is no misjoinder of causes of action if the widow in one suit sues the co-parceners of her deceased husband to recover her *stridhan* property improperly or illegally detained by them and also to enforce her right of maintenance out of the estate of the joint family

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

——— **O. II, r. 5**—*concld.*

of which during his lifetime her husband was a member. JANKIBAI *v.* SHRINIVAS GANESH (1913) **I. L. R. 38 Bom. 120**

——— **O. V, r. 5**—*Suit on mortgage—First summons to be for settlement of issues and not for final disposal—Practice and Procedure.* In 1910 a mortgage suit was filed. The plaintiff having died, the name of his son was substituted in place of his name on the 13th April 1912. On the same day, the Court issued summons for the first time to the defendants, for final disposal. On the day fixed for hearing, the Court raised issues, and as neither party had witnesses ready, the Court found the claim not proved in absence of evidence. The plaintiff having appealed: *Held*, reversing the decree, that there was a miscarriage of justice in the way the case had been disposed of. The scheme of the Civil Procedure Code required, in cases like the present, that the parties should have the opportunity to produce evidence relevant to issues framed after ascertaining matters as to which the parties were in dispute. *Held*, further, that the summons to the defendants should have been for settlement of issues and not for final disposal. TULJARAM HARICHAND *v.* SITARAM NARAYAN (1913) **I. L. R. 38 Bom. 377**

——— **O. VII, r. 11** (*d*)—*Objection by defendant that notice not duly served under s. 80—Plaint, if to be rejected or dismissed.* Where it was stated in the plaint that notice under s. 80, Civil Procedure Code, had been duly served, but after defendant had entered appearance it was discovered that the notice had not been duly served: *Held*, that it was too late to reject the plaint under O. VII, r. 11; and that there was also no statement in the plaint which suggested that the suit was barred. RATAN CHAND DHARAM CHAND *v.* SECRETARY OF STATE FOR INDIA (1914) . **18 C. W. N. 1340**

——— **O. IX, rr. 6, 13**—*Failure of defendant to appear in the course of the hearing after plaintiff has closed—Court, if may proceed to pass judgment on the materials before it—Application to set aside judgment as made ex parte—"Appearance"—"Default."* Where in the course of the hearing of a suit, the plaintiffs having closed their case the defence began and the cross-examination of one of its witnesses not having been finished at the end of a day, it stood adjourned to the next day when neither the defendant nor his witnesses nor his pleader appeared, and the Court treating the defence case as closed, heard plaintiff's arguments and delivered judgment: *Held*, that the mere fact that the Court had materials before it upon which it could pronounce judgment was not enough to bring the case under r. 3, O. XVII, as the other condition, *viz.*, that the adjournment must have been at the instance of a party, was not fulfilled. That the case fell under r. 2 of O. XVII, and the Court must be taken to have proceeded to dispose of the suit in one of the modes directed by O. IX, so that an application to set aside the

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

——— **O. IX, rr. 6, 13**—*concld.*

order under O. IX, r. 13, should have been entertained. The provisions of O. IX by themselves do not apply to a case in which the defendant has already appeared in answer to the summons but has failed to appear at an adjourned hearing of the suit. On such a case O. XVII applies, r. 2 applying to a hearing adjourned by the Court, r. 3 to a hearing adjourned at the instance of a party, in which last case, if the party fails to appear on the adjourned date and there are sufficient materials on the record to enable the Court to proceed to judgment the Court may dispose of the case under that rule. Even in such a case if there are not sufficient materials on the record the proper procedure to follow would be that laid down in r. 2. *Mariannissa* v. *Ramkalpa, I. L. R. 34 Calc. 235*, referred to. The test of a defendant's appearance in obedience to a summons for the purpose of r. 6, O. IX, is, as indicated in the form of the summons in App. B to Sch. I of the Code, whether the defendant has appeared in person or by pleader duly instructed and able to answer all material questions relating to the suit or who is accompanied by some person able to answer all such questions. In the present case, as the pleaders being furnished with due instruction could not be doubted, there was no non-appearance within r. 6, O. IX. REAJUDIN BASUNIA *v.* JIBAN MOHAN RAY (1914) . . . . . **18 C. W. N. 775**

——— **O. IX, rr. 6, 13; O. XVII, rr. 2, 3**—

See EX PARTE DECREE.

I. L. R. 41 Calc. 956

——— **O. XI**—

See DISCOVERY . **I. L. R. 41 Calc. 6**

——— **O. XX, r. 18**—*Agra Tenancy Act (II of 1901), s. 32—Joint Hindu family—Partition—Occupancy holding—Existence of occupancy holding no bar to partition. Held*, that the presence of an occupancy holding as an item of joint family property is no reason for not effecting a partition of the property as a whole. The Court can either give the occupancy holding to one party, taking from that party an equivalent in value, or if it be found impossible to do this, the Court can leave the occupancy holding undivided, merely making a declaration that the parties are entitled jointly to the holding. DWARKA *v.* RAM PAT (1914) . . . **I. L. R. 36 All. 461**

——— **O. XXI, rr. 2, 95**—*Decree-holder auction-purchaser, application by, for delivery of possession opposed by judgment-debtor who sets up agreement to postpone taking possession—Agreement whether adjustment—Objection rejected—Order, if appealable.* Where upon an application by the decree-holder auction-purchaser for delivery of possession, the judgment-debtor set up an agreement entered into in the course of proceedings for setting aside the sale, by which, he alleged, it had been stipulated that the judgment-debtor

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

O. XXI, rr. 2, 95—*concld.*

would allow the sale to be confirmed, but that the decree-holder should not take possession for two years, within which period, if the judgment-debtor made certain payments, the decree-holder was to reconvey the property to the judgment-debtor, and he prayed that the agreement should be certified under O. XXI, r. 2, of the Civil Procedure Code, and the Court rejected the judgment-debtor's application on the ground that the agreement did not come within the scope of O. XXI, r. 2: *Held*, that the order was appealable as coming within s. 47 of the Civil Procedure Code. *Muttia* v. *Appasami, I. L. R. 13 Mad. 504, Mahdhusudan Das* v. *Gobinda Pria Chowdhurani, I. L. R. 27 Calc. 34, Sariatoola Molla* v. *Raj Kumar Roy, I. L. R. 27 Calc. 709, Ram Narain Sahoo* v. *Bandi Pershad, I. L. R. 31 Calc. 737, Bhagwati* v. *Banwari Lal, I. L. R. 31 All. 82*, relied on. *Bhimal Das* v. *Ganesha Kuer, 1 C. W. N. 658, Mahomed Masraf* v. *Habil Mia, 6 C. L. J. 749*, explained, That the executing Court should entertain and enquire into the judgment-debtor's objection and not relegate the parties to a fresh suit as the matter could be dealt with under s. 47. *Per* COXE, J.—*Quære:* Whether the agreement alleged was an adjustment within the meaning of O. XXI, r. 2. HARI CHARAN DUTTA *v.* MON MOHAN NANDI (1913)
18 C. W. N. 27

O. XXI, r. 7 (*corresponding to Act XIV of 1882, s. 225*)—*Court of Wards Act* (*Bom. Act I of 1905*), *ss. 31 and 32—Executing Court, power of—Jurisdiction of the Court which passed the decree under execution—S. 32 of the Court of Wards Act* (*Bom. Act I of 1905*) *not retrospective.* Under Order XXI, rule 7, of the Civil Procedure Code (Act V of 1908) the executing Court has no power to question the jurisdiction of the Court which passed the decree under execution. S. 32 of the Court of Wards Act (Bom. Act I of 1905) was not intended to apply to pending suits. In terms it refers to suits "brought by or against" a Government ward. S. 32 must be read with s. 31 which provides that before such a suit is brought notice shall be delivered to, or left at, the office of the Court of Wards. Thus s. 32 does not apply to suits pending at the time of the assumption of superintendence of the ward's estate by the Court of Wards. HARI GOVIND *v.* NARSINGRAO KONHERRAO (1913) . **I. L. R. 38 Bom. 194**

O. XXI, rr. 35, 95 and 96—*Execution of decree—Purchase of undivided share in a house—Resistance to possession by judgment-debtor—Remedy to which purchaser is entitled.* In execution of a decree held by her the decree-holder purchased an undivided share in a house which the judgment-debtor owned jointly with one *S*. On attempting to get possession the decree-holder was resisted, not by *S*, but by the judgment-debtor. *Held*, on a construction of rules 35 and 95 of O. XXI of the Code of Civil Procedure, that the decree-holder was entitled to have the judgment-debtor

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

O. XXI, rr. 35, 95 and 96—*concld.*

removed from the premises. SARVI BEGAM *v.* TAJ BEGAM (1914) . **I. L. R. 36 All. 181**

O. XXI, rr. 46, 54—*Sale in execution of a hypothecation debt—Moveable property.* For the purposes of execution a debt due to judgment-debtor under a hypothecation bond is moveable property within the meaning of O. XXI, r. 46, Civil Procedure Code, and the procedure as to moveable property is applicable; the language of rule 46, which treats as moveable property a debt not secured by a negotiable instrument, is undoubtedly wide enough to cover a debt secured by a hypothecation bond or a simple mortgage. O. XXI, r. 54, is not applicable to such cases though the General Clauses Act and Transfer of Property Act speak of such debt as an interest in immoveable property. The security must follow the debt and if the debt is once attached, the benefit of the security would accrue to the attaching creditor if his remedy against the property still exists. *Tarvadi Bholanath* v. *Bai Kashi, I. L. R. 26 Bom. 305, Debendra Kumar Mandal* v. *Rup Lall Dass, I. L. R. 12 Calc. 546, Kashinath Das* v. *Sadasiv Patnaik, I. L. R. 20 Calc. 805, Karim-un-Nissa* v. *Phul Chand, I. L. R. 15 All. 134, Baij Nath Lohea* v. *Binoyendra Nath Palit, 6 C. W. N. 5, Balde Dhanrup* v. *Ramchandra Balwant, I. L. R. 19 Bom. 121*, and *Muniyappa Naik* v. *Subrahmania Ayyar, I. L. R. 18 Mad. 437*, followed. *Sami* v. *Krisanasami, I. L. R. 10 Mad. 169*, and the view of the majority in *Appasami* v. *Scott, I. L. R. 9 Mad. 5*, not followed. NATARAJA AYYAR *v.* SOUTH INDIAN BANK OF TINNEVELLY (1914) . **I. L. R. 37 Mad. 51**

O. XXI, r. 58—

See PROVINCIAL INSOLVENCY ACT (III OF 1907), SS. 20, 22, 46.
I. L. R. 36 All. 9

O. XXI, r. 58; O. XXXVIII, rr. 5 to 12—

See ACT NO. III OF 1907, SS. 13 (*3*), 47.
I. L. R. 36 All. 65

O. XXI, rr. 58, 63—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), SS. 268, 278, 283.
I. L. R. 38 Bom. 631

O. XXI, r. 90—

1. ——— "*Immoveable property*"—*Whether sale of some of properties sold can be set aside—Substantial loss with regard to some, if vitiates sale as to whole.* Where four lots of immoveable properties were sold in execution and it was found that there was substantial injury caused to the judgment-debtors with regard to one of the lots, but not with regard to the other three: *Held*, that in O. XXI, r. 90, "immoveable property" means any one of the immoveable properties, the sale of which is liable to be set

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

O. XXI, r. 90—*concld.*

aside upon the grounds mentioned in the section. That the Court was not bound to set aside sale of all four lots by reason of irregularity and substantial loss caused thereby with regard to one of them. *Macnaghten* v. *Mahabir Parshad Singh, I. L. R. 9 Calc. 656, 662*, referred to. RAJANI NATH RAKSHIT *v.* KUSUM KAMINI MAZUMDAR (1914) **18 C. W. N. 947**

2. ——— *Sale of immoveable property in execution of money-decree—Holder of another decree against the same judgment-debtor whose application for execution had been dismissed for non-prosecution prior to sale, if entitled to apply for setting aside the sale.* In execution of a decree for money, the immoveable properties of the judgment-debtors were sold and purchased by the opposite party on 9th April 1912. The petitioner, who also held a decree for money against the same judgment-debtors, had applied on the 13th March 1912 for execution of his decree; but his application was dismissed for non-prosecution on the 13th May 1912, and on the 20th May 1912 the petitioner applied to the Court to have the sale set aside under r. 90, O. XXI, Civil Procedure Code, on the ground of fraud and material irregularity. The lower Court rejected this application holding that he was not entitled to make it. *Held*, that the dismissal of the petitioner's application for execution of his decree on the 13th May for non-prosecution did not affect the right of the petitioner to a share in a rateable distribution of the assets, and on the date on which the application to set aside the sale was made under r. 90, it was made by a person entitled to a share in the rateable distribution of the assets and consequently should have been entertained by the Court. BYOMKESH CHACKRABARTTY *v.* JATINDRA NATH ROY (1913) **18 C. W. N. 1311**

——— **O. XXI, r. 101**—*Joint possession with judgment-debtor if possession in one's own interest—Scope of section.* A claimant who has an interest in the land of which possession has been delivered in execution of a decree either as a member of the family of the judgment-debtor or otherwise and who is affected by the delivery of possession, is a person who is in possession in respect of his own interest, though jointly with the judgment-debtor, and he can claim to be in possession of the property on his own account within the meaning of r. 101, O. XXI, of the Civil Procedure Code. RADHA GOBINDA MISRA *v.* RAGHU NATH MISRA (1913) . . . . **18 C. W. N. 695**

——— **O. XXII, rr. 4 and 9**—

See LIMITATION ACT (IX OF 1908), s. 5. **I. L. R. 36 All. 235**

——— **O. XXIII, r. 3, Sch. II, cls. 1-16**—*Suit—Reference to arbitration without leave of Court—Application to stay further progress of the suit—Application not according to law.* After the institution of a suit, the plaintiff and one of the defendants entered into an agreement to submit the matter in difference between them to arbitration without the leave of the Court. Thereupon, the defendant having applied to the Court to stay the further progress of the suit, the Court rejected the application on the ground, *inter alia*, that the reference did not amount to an adjustment of the matter in suit within the meaning of O. XXIII, r. 3, of the Civil Procedure Code (Act V of 1908). On appeal by the defendant the District Judge confirmed the order. The defendant having applied under the extraordinary jurisdiction: *Held*, confirming the order, that where the Court was seized of a cause, its jurisdiction could not be ousted by the private and secret act of parties, and if they, after having invoked the authority of the Court and placed themselves under its superintendence, desired to alter the tribunal and substitute a private arbitrator for the Court, they must proceed according to the law laid down in the first sixteen clauses of the Second Schedule of the Civil Procedure Code (Act V of 1908). *Held*, further, that parties litigating in Court had perfect liberty to compose their differences amongst themselves into any lawful agreement, compromise or satisfaction, and that when this was done, they had only to apply to the Court under O. XXIII, r. 3, of the Civil Procedure Code (Act V of 1908), but that a mere agreement to refer to arbitration, even though in other respects valid, could not be such an adjustment in whole or in part of the suit as the Court could give effect to under O. XXIII, r. 3. VYANKATESH MAHADEV *v.* RAMCHANDRA KRISHNA (1914) . . **I. L. R. 38 Bom. 687**

——— **O. XXV**—*Addition of parties at late stage of case—Order for security for defendant's costs—Poverty of plaintiff if alone can justify such order.* The plaintiff before bringing the suit made an agreement with one *S* by which the latter undertook to advance any amount that might be necessary to prosecute the suit up to the Privy Council. The amount so advanced was to be realised from any property recovered by a final decision or on compromise and the plaintiff and *S* agreed to divide equally the balance of what was recovered. *S* was to be able to compromise the suit and if the suit was unsuccessful the plaintiff was not to be liable to *S* for costs. The plaintiff brought the suit on the 31st July 1911. It came on for hearing on the 1st April 1913. The plaintiff closed his case on 22nd April and just before that the defendant applied to the Court to have *S* made a plaintiff and to have *S* and the plaintiff ordered to give security for the payment of the defendant's costs. The Court refused to make *S* a plaintiff, but ordered the plaintiff to give security for the costs of the suit up to Rs. 5,000. The High Court issued a rule to show cause why *S* should not be made a defendant and why the order about costs should not be set aside. *Held*, that *S* should not be made a party defendant partly because the original application to make *S*

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

——— **O. XXV**—*concld.*

a party plaintiff was made at too late a stage of the case and partly because it did not appear that *S* had any actual present interest in the property. That the order about costs was not made and could not be supported under O. XXV, but the Court has inherent power to make it. The question, however, which should determine the granting of such an order was whether the plaintiff had got a substantial interest in the suit or was he suing for another as a mere puppet. Such an order could not be made merely because the plaintiff was a poor man, and the lower Court having made the order only on that ground it was without jurisdiction. *Held*, further, that it could not be said that *S*'s interference was illegal in the sense that it was against public policy as described by the Privy Council in *Chedambara Chetty* v. *Runga Krishna, L. R. 1 I. A. 241, 264: s. c. 22 W. R. 149, 152.* HARI NATH SINGH *v.* RAM KUMAR BAGCHI (1913) . . . **18 C. W. N. 119**

——— **O. XXVI, r. 10** (*2*)—*Commissioner, right of parties to examine—Court's leave if may be withheld arbitrarily—Report not giving reasons for conclusion.* The Legislature in making the report of the Commissioner admissible in evidence by itself and his examination in connection therewith subject to the Court's leave intended to afford protection to him from vexatious examination at the instance of either party. The permission to examine the Commissioner cannot, however, be arbitrarily withheld. When the Commissioner has not given reasons for his conclusions it is a proper case for the examination of the Commissioner as a witness. SITARAM *v.* RAMA PROSAD RAM (1913) **18 C. W. N. 697**

——— **O. XXX, r. 2**—

See INSURANCE . **I. L. R. 41 Calc. 581**

——— **O. XXXIV**—*Limitation Act (IX of 1908), Sch. I, Art. 181—Consent decree—Instalments—Application for decree absolute for sale—Limitation.* An application for a decree absolute for sale of a mortgage charge under the terms of a consent decree, which provided for satisfaction of the decretal debt by instalments, is an application under the Civil Procedure Code (Act V of 1908), Order XXXIV, and is governed by Article 181, Schedule I, of the Limitation Act (IX of 1908). Such application must be made within three years from the time the right to apply accrues. DATTO ATMARAM *v.* SHANKAR DATTATRAYA (1913) **I. L. R. 38 Bom. 32**

——— **O. XXXIV, rr. 1, 14**—

See MORTGAGE . **I. L. R. 41 Calc. 727**

——— **O. XXXIV, r. 14**—

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 99 . **I. L. R. 36 All. 516**

——— **O. XXXVIII, r. 5**—*Attachment before judgment—Money decree—Death of judgment-debtor*

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

——— **O. XXXVIII, r. 5**—*concld.*

—Property passing by survivorship to his co-parcener—Subsequent execution of decree—Right of survivorship not defeated by execution. In 1906 the plaintiff obtained a money decree against *B*, having first obtained attachment before judgment of certain property which was joint-family property. In 1907 *B* died while joint with defendant 2. The plaintiff applied to execute the decree in 1909 and again in 1911. The lower Courts dismissed the application on the ground that the title of defendant 2 to the property by survivorship was not defeated by the attachment before judgment. The plaintiff having appealed: *Held*, that the attachment before judgment did not defeat the right of defendant 2 by survivorship; and that the plaintiff had taken no measure to which could be attributed the effect of defeating that right. SUBRAO MANGESH *v.* MAHADEVI (1913) **I. L. R. 38 Bom. 105**

——— **O. XXXIX, r. 2**—*Interlocutory injunction—Mandatory injunction—Power of Court to grant, pending trial.* The defendants erected on their own land a screen for blocking up the openings which the plaintiff had made in his wall. The plaintiff filed a suit to have the screen removed; and pending the suit applied for and obtained a mandatory injunction directing the defendants to remove the screen. The defendants applied to the High Court. *Held*, setting aside the order, that the lower Court had acted illegally and with material irregularity in the exercise of its jurisdiction, in granting the mandatory injunction. *Quære*: Whether a mandatory injunction can be considered as a "temporary" injunction under O. XXXIX, r. 2, of the Code of Civil Procedure. RASUL KARIM *v.* PIRUBHAI AMIRBHAI (1914) **I. L. R. 38 Bom. 381**

——— **O. XXXIX, r. 2, s. 24**—*Temporary injunction by Munsif—Suit transferred to the file of District Judge after injunction by Munsif—Breach of injunction after transfer—Jurisdiction of District Judge to punish for contempt—Bengal Civil Courts Act (XII of 1887).* In case of breach or disobedience of a temporary injunction, the Court which actually granted the injunction may punish the contempt under O. XXXIX, r. 2 (*3*). There is nothing in s. 24 of the Civil Procedure Code or in Chap. IV of the Bengal Civil Courts Act authorising, either expressly or by necessary implication, a Court to which the suit may be transferred but which did not grant the injunction, to exercise the special jurisdiction under O. XXXIX, r. 2 (*3*). JAHARUDDI *v.* HARI CHARAN PODDER (1913) . . . . **18 C. W. N. 470**

——— **O. XL, r. 1**—*Injunction—Receiver—Application for temporary injunction as to property in suit—Order putting each party in possession of part pending the suit.* The defendants in a suit for partition made an application to the Court touching the custody of the property, the subject-matter of the suit. The Court thereupon directed

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

——— **O. XL, r. 1**—*concld.*

that until the determination of the suit the plaintiffs should have the control and management of a portion of the property in suit, and the defendants of another portion. *Held*, that the order was a legal order and a proper order in the circumstances, and not the less so because the Court had acted *suo motu*. The order practically amounted to one under Order XL, rule 1, of the Code of Civil Procedure, 1908. DAN PRASAD *v.* GOPI KISHAN (1913) . . **I. L. R. 36 All. 19**

——— **O. XLI, r. 4**—*Appeal—Discretion of Court—Decree based on ground common to all defendants—Court not bound to set aside decree as against non-appellant defendant.* Where an Appellate Court reverses a decree in favour of a plaintiff upon grounds common to all the defendants, it is not therefore bound to set aside the decree as against a defendant who has not appealed from it. *Seshadri* v. *Krishnan, I. L. R. 8 Mad. 192*, referred to. NARAIN DIKSHIT *v.* BINAIK BHAT (1914) . . . **I. L. R. 36 All. 510**

——— **O. XLI, r. 10**—*Appeal—Vakalatnama—Appeal presented by a vakil whose vakalatnama was in fact defective.* Where, by an oversight, the name of a vakil who had filed an appeal was omitted from the body of the vakalatnama, it was *held*, on objection taken by the respondents, that the document was invalid and the appeal consequently had not been properly presented. The force of this objection to the validity of the appeal was not lessened by the fact that it was raised at a very late stage of the proceedings, in fact after two orders of remand had been made by the Court of first appeal. MUHAMMAD ALI KHAN *v.* JAS RAM (1913) . **I. L. R. 36 All. 46**

——— **O. XLI, r. 11, and O. XLVII, r. 1**—

See REVIEW . **I. L. R. 41 Calc. 809**

1. ——— **O. XLI, r. 22**—*Suit for dissolution of partnership—Appeal—Cross-objection—Cross-objections filed by one respondent against another. Held*, that on an appeal in suit for dissolution of partnership it is competent to the Court to allow a respondent to take cross-objections against another respondent. *Jadunandan Prosad Singh* v. *Deo Narain Singh, 16 C. W. N. 612*, and *Abdul Ghani* v. *Muhammad Fasih, I. L. R. 28 All. 95*, referred to. PALGOBIND *v.* RAM SARUP (1914) **I. L. R. 36 All. 505**

2. ——— *Respondent, if may support decree on ground decided against him without filing cross-objections.* The respondent in an appeal can urge in support of the judgment a point not decided in his favour without presenting a cross-appeal. IMAM ALI PATWARI *v.* ARFATUNNESSA (1913) . . **18 C. W. N. 693**

——— **O. XLI, r. 27**—*Appellate Court—Admission of fresh evidence—Practice regarding admission.* Where an Appellate Court desires to admit fresh papers in evidence, under rule 27

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

——— **O. XLI, r. 27**—*concld.*

of O. XLI of the Civil Procedure Code (Act V of 1908), it must record its reasons in writing for doing so and admit them formally in evidence. DAJI BABAJI *v.* SAKHARAM KRISHNA (1914) **I. L. R. 38 Bom. 665**

——— **O. XLIII, r. 1, cl. (*w*), and O. XLVII, r. 7**—

See REVIEW . **I. L. R. 41 Calc. 746**

——— **O. XLVII**—

See APPEAL TO PRIVY COUNCIL. **I. L. R. 41 Calc. 734**

1. ——— **O. XLVII, r. 1**—*Review of judgment—Suit dismissed for want of necessary notice as well as on the merits—Ground of review touching the merits only.* A suit against the Court of Wards was dismissed on two grounds: (i) that the notice given by the plaintiff under the Court of Wards Act was defective; and (ii) that the plaintiff was illegitimate. An application was made for review of judgment on the ground of discovery of new and important evidence on the question of legitimacy. *Held*, that the application was properly dismissed, inasmuch as the decision on the question of legitimacy on the reception of new evidence would not lead to the modification or setting aside of the original decree. MAHABIR PRASAD *v.* THE COLLECTOR OF ALLAHABAD (1914) **I. L. R. 36 All. 277**

2. ——— *Review petition—Subsequent filing of appeal—Jurisdiction of Court to hear review petition is not taken away by appeal subsequently filed—Practice.* An application for review of judgment was filed in a District Court and a rule *nisi* was granted. The party subsequently filed an appeal in the High Court. The District Court rejected the review application on the ground that it could not proceed with the application as an appeal was already filed. The applicant having applied to the High Court: *Held*, setting aside the order and directing the District Court to dispose of the application on the merits, that there was no express provision in the Civil Procedure Code which rendered the application for review incompetent on the mere presentation of an appeal by the same party at any subsequent time. *Chenna Reddi* v. *Peddaobi Reddi, I. L. R. 32 Mad. 416*, followed. NARAYAN PURUSHOTTAM *v.* LAXMIBAI (1914) . **I. L. R. 38 Bom. 416**

——— **Sch. II, cl. 11**—*Arbitration—Reference to arbitration on condition that certain adjustments should not be taken into consideration—Adjustment, difference between treating as an account stated and as a mere admission—Admissibility of documents in support of particular items though excluded as evidence of a general settlement—Arbitrator, misconduct of—Evidence, honest though mistaken admission of a document by an arbitrator in violation of a rule of evidence introduced pro hac vice.* The defend-

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

——— **Sch. II, cl. 11**—*concld.*

ant in an action brought to recover certain sums claimed by the plaintiff under a mortgage and two deeds of further charge consented to the suit being referred to arbitration on a condition, which was embodied in the consent order referring the case to arbitration, to the following effect:—"And it is further ordered that the said arbitrators do proceed on the basis of there having been no adjustments, and the adjustments relied upon by the plaintiff in this suit shall not be taken into consideration." The arbitration proceedings were carried on before arbitrators appointed for the purpose and afterwards before an umpire and in the course of the proceedings the umpire in spite of the defendant's protests admitted one of the adjustments in evidence as proof of an admission by the defendant that a certain item of Rs. 1,300 included in the adjustment was due from him to the plaintiff. Previously the other of the two adjustments had been used by the plaintiff without protest from the defendant to prove one item therein. The defendant protested and asked the umpire to submit a special case for the consideration of the Court under clause 11 of the Civil Procedure Code. The umpire doubted whether that clause would apply, but postponed further consideration of the item in question to enable the defendant to move the Court, if so advised, for leave for the umpire to state a special case. The defendant, thereupon, purported to put an end to the umpire's authority and refused to go on with the reference, which nevertheless was proceeded with before the umpire *ex parte* and an award made. *Held*, that the passage in the consent order quoted above was reasonably susceptible of two constructions, that it was either a particular and specific, following upon a general, exclusion of all adjustments *qua* adjustments; or, as contended by the defendant, a stipulation that certain documents containing the adjustments should not be admitted in evidence for any purpose; and that it was possible to admit a document as evidence in support of a particular item and at the same time exclude it as evidence of a general settlement. *Held*, further, that if the defendant's contentions were correct, the stipulation relied on was a rule of evidence introduced *pro hac vice*, and that the honest though mistaken admission by the umpire of a document in violation of that rule would not be a ground for setting aside the award, and that the defendant's conduct in rejecting the umpire's offer to adjourn consideration of the item under discussion in order to give the defendant an opportunity to obtain the Court's leave for a statement of the case and in deciding to withdraw from the reference without the leave of the Court was incorrect. AISHABAI *v.* ESSAJI (1913) . **I. L. R. 38 Bom. 60**

——— **Sch. II, paras. 14, 15, 20**—

See ARBITRATION **I. L. R. 36 All. 336**

——— **Sch. II, paras. 15 and 16; O. XXXII, r. 7**—*Arbitration—Agreement by guardian ad litem of minor party to refer—No objection taken to validity of award—Decree in accordance with award—Appeal. Per* RICHARDS, C. J. and BANERJI and RYVES, JJ. Where an objection to the validity of an award, which might have been raised under article 15 of the second schedule to the Code of Civil Procedure, is not raised within the time limited, or, being raised, is rejected and the Court proceeds to pronounce judgment and to frame a decree, no appeal will lie except on the grounds stated in article 16 of the same schedule. *Semble* (*per* RICHARDS, C.J., and RYVES, J.): that Order XXXII, rule 7, of the Code of Civil Procedure, 1908, does not control article 1 of the second schedule. It is not therefore necessary for the guardian of a minor party to obtain the express leave of the Court before agreeing to a reference to arbitration being made by the Court. *Ghulam Khan* v. *Muhammad Hassan, I. L. R. 29 Calc. 167*, and *Hardeo Sahai* v. *Gouri Shankar, I. L. R. 28 All. 35*, referred to. *Lakshmana Chetti* v. *Chinnthambi, I. L. R. 24 Mad. 326*, distinguished. LUTAWAN *v.* LACHYA (1913) **I. L. R. 36 All. 69**

CIVIL PROCEDURE CODE (ACT V OF 1908)—*concld.*

——— **Sch. II, paras. 15, 16**—*concld.*

——— **Sch. II, para. 20, cl.** (*2*)—*Private award, application to file—Forum of institution and appeal, if depends on value of award or value of matter in dispute—Change of law.* When an award has been made on a referene to arbitrators without the intervention of the Court, the amount of the award and not that originally in dispute between the parties determines the forum in which an application to file the award is to be made and the Court to which appeal shall lie from the order passed on the application. *Narsingh Das v. Ajodhya Prosad Sukul, I. L. R. 31 Calc. 203*, not followed in view of the change in the law. MOHESH CH. KOONDOO *v.* AMAR CHANDRA KOONDOO (1914) . . **18 C. W. N. 867**

CO-ACCUSED.

See CONSPIRACY **I. L. R. 41 Calc. 754**

See EVIDENCE ACT (I OF 1872), S. 30. **I. L. R. 38 Bom. 156**

CO-OPERATIVE SOCIETIES ACT (II OF 1912).

——— **ss. 19, 20**—

——— *Priority of registered societies to other creditors, how enforceable—Rateable distribution—Civil Procedure Code (Act V of 1908), s. 73, if applicable—Charge if any.* By an application made under s. 73 of the Code of Civil Procedure a registered Co-operative Society cannot enforce its prior claim within the meaning of s. 19 of Act II of 1912, as against a judgment-creditor at whose instance property is going to be sold, if they have no decree or a charge under s. 20 of the said Act. Other remedies may still be open to such Society. ABDUL KADIR *v.* SHAHABAZPUR CO-OPERATIVE BANK (1914) . **18 C. W. N. 1140**

CO-OPERATIVE SOCIETY.

See CO-OPERATIVE SOCIETIES ACT.

CO-OWNER.

See TEMPORARY INJUNCTION.
I. L. R. 41 Calc. 436

——— **contract by—**

See SPECIFIC RELIEF ACT (I OF 1877), SS. 15, 17 . **I. L. R. 37 Mad. 403**

——— *Suit by, for joint possession of land and injunction—Injury or likelihood thereof not alleged in plaint—Hostile title not set up by defence—Decree for joint possession if should be given—Ouster, meaning of—Common law action for ejectment and equity suit for injunction, distinction between, if should be introduced in this country—Principle of equity, justice and good conscience.* The plaintiffs and the defendant were co-sharers in a mehal. Each co-sharer was in sole occupation of some lands appertaining to the mehal as *khamar* lands and the defendant was in such possession of some lands. On the defendant commencing some building on portions of the land the plaintiffs brought a suit for recovery of joint possession of the land in dispute on declaration of their proprietary right to their share in it, for demolition of the building raised, for an injunction restraining the defendant from building on the land. The defendant did not claim any exclusive title to the land and the plaintiffs did not allege that they had sustained, or were likely to sustain, any substantial injury by reason of the sole occupation of the land or building thereon by the defendant. *Held*, that the mere fact of sole occupation by one co-sharer does not necessarily constitute an ouster of other co-sharers nor does it entitle the latter to a decree for joint possession. Ouster means 'dispossession of one co-sharer by another where a hostile title is set up by the latter and when the occupation of the latter is not consistent with joint ownership. *Held*, that there being no assertion of hostile title in the present case, there was no ouster of the plaintiffs by the defendant. That the distinction between a common law action for ejectment and an equity suit for an injunction should not be introduced in this country and questions of joint possession and injunction should be decided on the principles of justice, equity and good conscience. That in the present case the mere fact that the land in suit adjoined the dwelling house of the plaintiffs irrespective of any injury would not be a sufficient ground, consistent with the principles of justice, equity and good conscience, to give joint possession or order the demolition of the buildings already erected, or restrain the defendant from building on it. BASANTA KUMARI DASSYA *v.* MOHESH CHANDRA SHAHA (1913)
18 C. W. N. 328

CO-SHARER.

See HINDU LAW PARTITION.
L. R. 41 I. A. 247

See PENAL CODE (ACT XLV OF 1860), S. 447 . . **I. L. R. 36 All. 474**

CO-SHARER—*concld.*

——— **payment by—**

See SALE FOR ARREARS OF REVENUE.
I. L. R. 41 Calc. 1092

——— *Sole occupation by, of joint land—Ouster—Suit for joint possession—Justice, equity and good conscience—Statu quo when maintained.* Where it is found that a portion of the joint land was marshy and was jointly possessed by all the co-owners although they had other lands in separate possession and that when the marsh silted up one of the co-owners occupied the silted up land to the exclusion of others: *Held*, in a suit by one of the co-owners for joint possession, that there was ouster, and plaintiff was entitled to recover joint possession without bringing a suit for partition. Where parties are contented with joint possession of a portion of the joint land and separate possession of the rest, from the point of view of justice, equity and good conscience, the *statu quo* ought to be restored and the party dissatisfied relegated to a suit for partition. KUMUD LAL RAY *v.* JOGENDRA MOHAN RAY (1914)
18 C. W. N. 609

COAL.

See MINING LEASE.
I. L. R. 41 Calc. 493

COASTING-VESSELS ACT (XIX OF 1838).

——— **ss. 4, 7 and 13**—*Registry of vessels—Certificate of registry—Certificate issued in the name of a person who trades in his own name jointly with his son—The son continuing the business in the same name after the person's death—Fresh certificate not obtained—Liability of the son for plying the craft without certificate.* A person owning a craft had taken out a certificate of registry in his own name under s. 7 of the Coasting-Vessels Act (XIX of 1838). He traded in his own name jointly with his sons. On his death, his son carried on the business as before under the same name and did not take out a fresh certificate for the craft. The son was prosecuted under s. 13 of the Act for plying the craft without a certificate; but was acquitted by the Magistrate. The Government having appealed: *Held*, that the craft having been registered in the father's name, and the ownership of it having passed on his death to his son, the latter was bound to obtain a fresh certificate in his own name under s. 4 of the Coasting-Vessels Act (XIX of 1838); and that his failure to do so was punishable under s. 13 of the Act. EMPEROR *v.* HARIDAS LAKHMIDAS (1913) . **I. L. R. 38 Bom. 111**

COCAINE.

——— **importation of—**

See EVIDENCE . **I. L. R. 41 Calc. 545**

——— *Possession of illicit cocaine—Mere possession of bill of lading and invoice relating to illicit cocaine seized in the Custom House—Attempting to import such cocaine into Bengal—Alteration, on the same facts, of conviction of being in possession to one of attempting to import—Bengal Excise Act (Ben. Act V of 1909), ss. 2 (12), 46 (a),*

COCAINE—*concld.*

52 and 61—Criminal Procedure Code (Act V of 1898), ss. 236, 237. The doctrine of constructive possession must be very cautiously applied, especially in the domain of criminal jurisprudence. The mere possession of a bill of lading and an invoice covering goods lying undelivered in the Custom House, by a person who is not the consignee, does not amount to possession of such goods within the meaning of the Bengal Excise Act. *Kashi Nath Bania* v. *Emperor, I. L. R. 32 Calc. 557,* and *Ashruf Ali* v. *Emperor, I. L. R. 36 Calc. 1016,* distinguished. Where the accused was found in possession of a bill of lading and an invoice relating to six bales of old wearing apparel which contained, to his knowledge, a large quantity of contraband cocaine purporting to be consigned to R. P. by a firm in London, and he made over the documents to a firm of shipping agents for clearance from the Custom House and failed to produce the alleged consignee for whom he professed to be acting, or to give any clue about him: *Held,* that the conviction of being in possession of such cocaine, under ss. 46 (*a*) and 52 of the Bengal Excise Act, was not sustainable, but that the accused should, having regard to ss. 236 and 237 of the Criminal Procedure Code, be convicted, on the same facts, of attempting to import the cocaine into Bengal under s. 61 read with ss. 46 (*a*) and s. 2 (*12*) of the Act. KALI CHARAN MUKERJEE *v.* EMPEROR (1913) . **I. L. R. 41 Calc. 537**

COGNIZANCE.

See COMPLAINT **I. L. R. 41 Calc. 1013**

COLLECTOR.

See BHAGDARI ACT (BOM. ACT V OF 1862), S. 3. . . **I. L. R. 38 Bom. 679**

See CIVIL PROCEDURE CODE (ACT V OF 1908), SS. 68, 70, R. 14; O. XXI, R. 101. **I. L. R. 38 Bom. 673**

COLLISION.

See CONTRIBUTORY NEGLIGENCE. **I. L. R. 41 Calc. 308**

COMMISSION.

See ADMINISTRATOR PENDENTE LITE. **I. L. R. 41 Calc. 771**

COMMITMENT.

See CRIMINAL PROCEDURE CODE, S. 213. **I. L. R. 38 Bom. 114**

COMMON LAW.

See CONTEMPT OF COURT. **I. L. R. 41 Calc. 173**

COMPANIES ACT (VI OF 1882).

———— **ss. 76, 77**—*Articles of association—Agent—Borrowing powers—Contract Act (IX of 1872), s. 237—Estoppel.* The agents of a joint stock company—a joint Hindu family firm—borrowed a considerable sum of money on hundis executed by the managing member of the firm in the name of the company. These hundis were signed with the name of the managing member simply, having nothing on the face of them to indicate that the person who signed them was signing as an agent and not in his personal capacity. The company had no valid articles of association, and neither the memorandum of association nor table *A* of the Indian Companies Act, 1882, empowered the agents to borrow money. There were, however, what purported to be articles of association, which though legally invalid (they had never been registered), were treated by the company and submitted to the public as being the genuine and legally adopted articles of association of the company. These articles did give the agents of the company power to borrow. *Held,* that the signature of the managing member of the agent-firm was sufficient, and that, although the articles of association were not valid, yet the company was in the circumstances estopped from raising the plea of their invalidity against holders in due course of these hundis. KUNJ KISHORE *v.* THE OFFICIAL LIQUIDATOR, SHRI BALDEO MILLS, LD. (1914) **I. L. R. 36 All. 416**

COMPANIES ACT (VI OF 1882)—*concld.*

———— **s. 76**—*concld.*

COMPANY.

———— **borrowing powers of—**

See COMPANIES ACT (VI OF 1882), SS. 76, 77 . . **I. L. R. 36 All. 416**

1. ———— *Contract with company, terms of, in correspondence, and company's minutes, conflict between—Right of heir to enforce terms of sale.* *R* by letter offered to sell to the appellant company a patent for Rs. 10,000 paid in cash and Rs. 20,000 in paid-up shares of the company. The letter contained a provision that the company would be entitled to retain and cancel those shares in the event of *R*, who was to serve as the company's manager, by reason of death, resignation, etc., failing to complete 4 years' service. The company in their minutes recorded resolutions which did not embody this condition and in express terms spoke of the transaction as a sale of the patent for Rs. 30,000. *Held,* that the only contract between *R* and the company was that contained in the minute and that if this minute incorporated the terms of the letter, it did so in so far only as the letter was not inconsistent with the express terms of the minute. That on *R*'s death within 4 years, *R*'s widow was entitled to have fully paid-up shares to the amount of Rs. 20,000 allotted to her. PERFECT POTTERY COMPANY *v.* IDA L. ROSE (1914) **18 C. W. N. 1185**

2. ———— *Sale of shares—Bond given for price—Unauthorized refusal of manager to register transfer—Suit on bond—Plea of non-registration of transfer not open to defendant.* *A* sold to *B* certain shares in a company, and *B*, instead of paying the price in cash, executed a

COMPANY—*concld.*

bond therefor in favour of *A*. Registration of the transfer was refused by a person describing himself as the chief manager of the company, who, however, did not appear to have any authority under the articles of association to refuse to register a transfer of shares. *Held*, on suit by *A* on the bond, that it was not competent to *B* to plead as a defence that the transfer of the shares purchased by him had not been registered, as there had in fact been no refusal to register by the company. BAHADUR SINGH *v.* SHIAM SUNDAR TUG (1914) . . . **I. L. R. 36 All. 365**

3. ——— *Board of Directors—Allotment of shares by an irregularly constituted board—Notice of allotment not given to applicant—Limitation—Contributory.* *Held*, that an allotment of shares in a joint stock company made by an irregularly constituted board of directors was *primâ facie* invalid. *British Empire Match Company, Limited, Ex parte Ross, 49 Law Times, 291*, referred to. But this defect may sometimes be cured if the articles of assocation of the company provide for the validation of an act done by a *de facto* director in a *bonâ fide* manner. *Held*, also, that if no notice of allotment of shares in a company is given to an applicant before the company goes into liquidation, such applicant is not liable to be placed on the list of contributories. *In re Scottish Petroleum Company, 23 Ch. D. 413, Dawson* v. *African Consolidated Land and Trading Company*, [*1898*] *1 Ch. 6*, and *British Asbestos Company* v. *Boyd*, [*1903*] *2 Ch. 439*, referred to. CHANGA MAL *v.* THE PROVINCIAL BANK, LD. (1914) . . . **I. L. R 36 All. 412**

COMPENSATION.

See CONTRACT ACT (IX OF 1872), S. 65. **I. L. R. 38 Bom. 249**

See CRIMINAL PROCEDURE CODE, S. 250. **I. L. R. 36 All. 382**

See CRIMINAL PROCEDURE CODE, SS. 250, 537 . . **I. L. R. 36 All. 132**

See LAND ACQUISITION ACT (I OF 1894). **I. L. R. 38 Bom. 37**

COMPLAINT.

See CRIMINAL PROCEDURE CODE, S. 203. **I. L. R. 36 All. 129**

See CRIMINAL PROCEDURE CODE, S. 437. **I. L. R. 36 All. 53**

———**frivolous or vexatious—**

See CRIMINAL PROCEDURE CODE, SS. 250, 537 . . **I. L. R. 36 All. 132**

———*Complaint by husband of minor wife against certain persons of offences against her—Preliminary inquiry by Magistrate—Withdrawal of complaint by husband—Refusal by Magistrate to dismiss complaint—Examination of wife and other prosecution witnesses at inquiry—Cognizance against persons not named in the complaint on evidence taken at such inquiry—Cognizance on complaint or information—Criminal Procedure*

COMPLAINT—*concld.*

Code (Act V of 1898), ss. 190 (1) (a), (c), 202, 203—Practice. A Magistrate taking cognizance of an offence upon a complaint against certain specified persons, is competent to proceed against others not named therein but who are disclosed by the prosecution evidence, taken on a preliminary inquiry under s. 202 of the Criminal Procedure Code, to have been concerned in the offence. *Charu Chandra Das* v. *Narendra Krishna Chakravarti, 4 C. W. N. 367, Raghab Acharjee* v. *Empress, 3 C. W. N. cclxxixn*, followed. *Khudiram Mookerjea* v. *Empress, 1 C. W. N. 105*, not followed. *Jagat Chandra Mozumdar* v. *Queen-Empress, I. L. R. 26 Calc. 786*, distinguished. Where a complaint was made under ss. 342 and 363 of the Penal Code, against four persons, by the husband of a girl aged 11, whereupon the Magistrate, after examining him on oath, ordered him to prove his case, and two days later he presented a petition for the withdrawal of the complaint and its dismissal as untrue, but the Magistrate proceeded, on the date fixed for the preliminary inquiry, to summon the witnesses, and thereafter examined the girl and some other prosecution witnesses and found that, though there was no satisfactory evidence against the original accused, there was sufficient evidence against other persons, and, treating the girl as the real complainant, issued processes against them for offences under ss. 342, 352 and 363 of the Penal Code: *Held*, that the Magistrate was right in ordering the examination of the witnesses to ascertain if there was any substance in the petition of withdrawal and in the complaint. *Held*, further, that he took cognizance against the persons not named in the complaint under cl. (*a*) and not cl. (*c*) of s. 190 (*1*) of the Criminal Procedure Code. DEDAR BUKSH *v.* SYAMAPADA DAS MALAKAR (1914) **I. L. R. 41 Calc. 1013**

COMPOSITION-DEED.

See STAMP ACT (II OF 1899), SCH. I, ART. 22 . **I. L. R. 38 Bom. 576**

COMPOUNDING OFFENCE.

See MADRAS FORESTS ACT (V OF 1882), SS. 26, 53, 55. **I. L. R. 37 Mad. 280**

———**grievous hurt—**

See CONTRACT . **I. L. R. 37 Mad. 385**

COMPROMISE.

See AGREEMENT **I. L. R. 37 Mad. 408**

CONCILIATOR.

See LIMITATION **I. L. R. 38 Bom. 653**

CONCURRENT FINDINGS OF FACT.

See REGISTRATION. **I. L. R. 41 Calc. 972**

See SPECIAL OR SECOND APPEAL. **I. L. R. 37 Mad. 443**

CONDUCT OF PARTIES.

See ZAMINDARI SALE.
I. L. R. 37 Mad. 22

CONFESSION.

See ADMISSIONS AND CONFESSIONS TO POLICE OFFICERS.
I. L. R. 41 Calc. 601

See CO-ACCUSED **I. L. R. 38 Bom. 156**

See EVIDENCE ACT (I OF 1872), S. 30.
I. L. R. 38 Bom. 156

See EVIDENCE ACT (I OF 1872), S. 91.
I. L. R. 36 All. 222

CONFIRMATION.

See SALE IN EXECUTION OF DECREE.
I. L. R. 41 Calc. 590

CONSENT DECREE.

See CIVIL PROCEDURE CODE (1908), O. XXXIV . **I. L. R. 38 Bom. 32**

See INSTALMENTS **I. L. R. 38 Bom. 32**

CONSIDERATION.

See EVIDENCE ACT (I OF 1872), S. 92, PROVISO (1) . **I. L. R. 36 All. 537**

See GUARDIANS AND WARDS ACT (VIII OF 1890), SS. 7 (2), 29, 30.
I. L. R. 37 Mad. 38

See MORTGAGE . **I. L. R. 36 All. 478**

CONSIGNEE.

——— duty of—

See CARRIERS . **I. L. R. 41 Calc. 703**

CONSIGNMENT.

——— loss of—

See RAILWAY COMPANY.
I. L. R. 41 Calc. 576

CONSPIRACY.

——— ——— ——— *Constructive offence in furtherance of an intention common to the accused on trial and another—Abetment by conspiracy—Conspiracy between two persons on trial, three other so named and others unknown—Acquittal by jury, of conspirators on trial, effect of—Verdict not conclusive as to persons not on trial—Distinct evidence against latter—Character of verdicts in England and India—Evidentiary value of the same witness as to the identity of different persons—Opinion of the Judge as to the weakness of evidence of identity of persons under trial—Stay of trial against others—Warrant against one, withdrawn on acquittal of other alleged co-offenders—Re-institution of proceedings by the District Magistrate on the advice of law-officers of the Crown—Legality of proceedings.* Where two persons were charged under ss. $\frac{302}{34}$ and $\frac{326}{34}$ of the Penal Code, for offences committed in pursuance of an intention common to them and to the petitioner, and also under ss. $\frac{302}{114}$ and $\frac{326}{114}$ of the Penal Code, for abetment by conspiracy between themselves, the petitioner, two others named and others unknown, and were acquitted by jury: *Held*, that the acquittal on the conspiracy charges did not conclude the liability of the petitioner for conviction of the same offence, as there were two others named and others unknown who were also alleged to have been members of the conspiracy. *Held*, also, that the acquittal did not affect the question of the petitioner's criminality, as the jury had not, and could not have, formed or expressed an opinion as regards him, as he was not then on trial, and that there was, besides, distinct evidence alleged against him in the case. Technicalities of the English law based on the sacred character of jury-verdicts cannot be imported so as to give such a character to verdicts in India where by the express provisions of the law it does not attach to them. *Ramesh Chandra Banerjee* v. *Emperor*, *I. L. R. 41 Calc. 350*, *per* BEACHCROFT, J., approved. The evidence of the same witness as to the identification of one person may be quite different to that as regards the identification of others. Where the Judge clearly stated that the identification of the two persons under trial was weak, and on that ground he accepted the verdict of acquittal, it would be unwarrantable for the High Court to stay the ordinary course of justice in the case of the petitioner. Where, after the acquittal of the two persons on trial, the warrant against the petitioner was withdrawn, but proceedings were re-instituted against him by the officer in charge of the police-station within whose jurisdiction the offence was committed, under the direction of the District Superintendent of Police who could not appear himself but had been instructed by the District Magistrate on the advice of the law officers of the Crown that the case could go on against the petitioner on the evidence: *Held*, that the District Magistrate was competent to take cognizance of the case if on taking legal advice he thought that the evidence brought the accused within the purview of the law. MANINDRA CHANDRA GHOSE *v.* EMPEROR (1914) . . . . **I. L. R. 41 Calc. 754**

CONSTRUCTION.

See HINDU LAW—WILL.
I. L. R. 41 Calc. 642

CONSTRUCTION OF DOCUMENT.

See PENSIONS ACT (XXIII OF 1871), S. 11.
I. L. R. 36 All. 318

See TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 58, 100.
I. L. R. 36 All. 201

See WILL . **I. L. R. 36 All. 101**

——— ——— ——— *Sale or agreement to sell—Intention is the test—Want of registration—Registration Act (III of 1877), s. 17—Admissibility—Evidence.* Whether a document operates by way of a present conveyance of property or only as an agreement to create a future right depends upon the intention of the parties as expressed in the instrument. Even if a present right is created

CONSTRUCTION OF DOCUMENT—*concl.*.

the instrument, though unregistered, is admissible in evidence, in a suit for specific performance. *Nagappa* v. *Devu, I. L. R. 14 Mad. 65*, and *Upendra Nath Banerjee* v. *Umesh Chandra Banerjee, 15 C. W. N. 575*, followed. The instrument in this case was construed as an agreement to sell notwithstanding that it contains certain words showing a present transfer. MANGAMMA *v.* RAMAMMA (1914) **I. L. R. 37 Mad. 480**

CONSTRUCTION OF STATUTES.

See STATUTES, CONSTRUCTION OF.

——————— *Rights if may be conferred by implication from language of statutes.* Rights cannot be conferred by mere implication from the language used in a statute. There must be clear and unequivocal enactment. *Arnold* v. *Mayor of Gravesend, 2 K. & J. 574, 591 : s. c. 110, R. R. 227*, followed. AMULYA RATAN SIRCAR *v.* TARINI NATH DEY (1914) . **18 C. W. N. 1220**

CONSTRUCTION OF WILL.

See WILL . **I. L. R. 38 Bom. 697**

CONSTRUCTIVE OFFENCE.

See CONSPIRACY **I. L. R. 41 Calc. 754**

CONTEMPT.

——— **of inferior Court—**

See CONTEMPT OF COURT.

I. L. R. 41 Calc. 17

CONTEMPT OF COURT.

1. ——————— *Calcutta High Court, jurisdiction of, to take summary proceedings in contempt of mofussil Magistrate—Calcutta High Court, Original Side, jurisdiction of—Constitution, jurisdiction, power and authority of the Supreme Court, Sudder Dewani Adawlut, Sudder Nizamut Adawlut and King's Bench—Court of Record, nature of—Contempt of inferior Court, whether always contempt of High Court—What constitutes contempt of High Court—Summary proceedings—Criminal contempt not to be punished unless proved by legal evidence—Statement on information and belief, if legal evidence and when—Admission on affidavit, when can be considered by Court—"Positive evidence"—Supplementary affidavit or evidence making up defects of original motion, if allowable—Calcutta High Court Rules—"Superintendent and Remembrancer of Legal Affairs and ex officio Public Prosecutor, Bengal," if he can represent Government on the Original Side of Calcutta High Court—Costs—Criminal Investigation Department, if it can be prosecutor—Party against whom contempt proceedings are sought, rights of, to know who the prosecutor is—Criminal Procedure Code (Act V of 1898), s. 196—Penal Code (Act XLV of 1860), effect of, on previous penal laws—Indian High Courts Act (24 & 25 Vict., c. 104), ss. 1, 8, 9, 15—Letters Patent, 1862, cls. 1, 26, 27—Letters Patent, 1865, cls. 27, 28—Charter of 26th March 1774 (13 Geo. III, c. 63), cls. 2, 4, 21*

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—21 Geo. III, c. 70, §21—Reg. IX of 1793—Reg. II of 1801, s. 2—Reg. XXX of 1841—16 Charles I, c. 10—53 Geo. III, c. 155—Reg. VIII of 1816—Reg. XIII of 1829. The Calcutta High Court has no jurisdiction to commit, on a summary proceeding, for contempt of a mofussil criminal Court. It has not any such powers from the jurisdiction it has inherited from the three abolished Courts,—the Supreme Court, the Sudder Dewani Adawlut and the Sudder Nizamut Adawlut ; —nor have such powers been vested in it by any Statute, Letters Patent or local Acts ; nor has it any such Common Law powers. *Rex* v. *Davies, [1906] 1 K. B. 32, Queen* v. *Lefroy, L. R. 8 Q. B. 134, Queen* v. *Judge of the Brompton County Court and Vague, [1893] 2 Q. B. 195*, and *In re Venkat Rao, 21 Mad. L. J. 832*, referred to. *Surendra Nath Banerjee* v. *Chief Justice and Judges of the High Court, I. L. R. 10 Calc. 109 ; L. R. 10 I. A. 171*, distinguished. An offence in the nature of a contempt of an inferior Court within the limits of the Calcutta High Court's Original Jurisdiction as being a misdemeanour under the Common Law, can be punished by that High Court on a summary proceeding. The Calcutta High Court has also the power on its Crown side to punish, on a summary proceeding, an interference with the due administration of justice by a Division Bench in relation to a criminal appeal pending before it, where such interference amounts to an offence under the Common Law. It has such power to punish even before the appeal is filed in this Court. The constitution, jurisdiction, power and authority of the Supreme Court, the Sudder Dewani Adawlut, the Sudder Nizamut Adawlut and the King's Bench reviewed. Nature of "Courts of Record" analysed. A contempt of the inferior Court need not necessarily be a contempt of the High Court. But facts showing that witnesses before an inferior Court had been attacked, deterred and frightened or in some manner dissuaded, hindered or prevented from giving evidence may amount to contempt of the High Court ; while an attack upon the Magistrate, any endeavour to corrupt him or any direct obstruction of his proceedings would not, speaking generally, be a contempt of the High Court. *Skipworth's Case, L. R. 9 Q. B. 230*, followed. To justify recourse to the arbitrary, unlimited and uncontrolled power to take summary proceedings in cases of criminal contempt of Court, it is not enough that there should be a technical contempt of Court. It must be shown that it was probable that the publication would substantially interfere with the due administration of justice. *O'Shea* v. *O'Shea and Parnell, [1890] 15 P. D. 59*, referred to. Where, notwithstanding the *primâ facie* tendency of the language, there is no real prejudice created to the administration of justice or no real case made for the interference of the Court, the Court should not take summary proceedings in contempt. No person can be punished for criminal contempt unless the offence be proved by legal evidence. *In re Pollard, 5 Moo. N. S. 110 ; 16 E. R. 457*, followed. A state-

CONTEMPT OF COURT—*contd.*

ment resting on information and belief is not legal evidence in a case of criminal contempt of Court. A man in a criminal proceeding need not deny that which is not legally proved against him. *The Queen* v. *Stanger, L. R. 6 Q. B. 352,* followed. Even in a civil proceeding a statement on information and belief is not admissible except on an interlocutory application, and in that case, the grounds of such belief must be stated. A Court can take an admission into consideration though contained in the affidavit in answer to the motion. "Positive evidence" means evidence "which goes expressly to the very point in question, and that which, if believed, proves the point without aid from inference or reasoning as the testimony of an eye-witness to an occurrence, as distinguished from indirect or circumstantial evidence." The Penal Code contains no specific repeal of the penal laws then in force. This was intentional as it was considered possible that some offences might have been omitted which it would not be intended to exempt from penal consequences. Supplementary affidavits or evidence to make up defects of original motion should not be allowed and are against the rules of the Calcutta High Court. There may be difficulty as to an application for taking proceedings for contempt of Court by the officer described as "The Superintendent and Remembrancer of Legal Affairs and *ex officio* Public Prosecutor, Bengal." The officer described as the Legal Remembrancer is not authorised to represent the Government on the Original Side of the Court. The usual rule, when a motion for contempt is dismissed, is that the respondents' costs should be paid. *Per* MOOKERJEE, J. Whatever share the Criminal Investigation Department may have in the investigation of a case, they cannot be deemed in law to be the prosecutors in a criminal case. It is a matter of vital importance for the party against whom an order for contempt of Court is sought, to know the person or persons at whose instance the application is made; if the application is refused he is entitled to know who is responsible for his costs; if, on the other hand, the application is successful, he is entitled to know who the respondent is in a possible appeal by him. LEGAL REMEMBRANCER *v.* MATILAL GHOSE AND OTHERS (1913) . . **I. L. R. 41 Calc. 173**

2. ——————— *Receiver appointed by the Court, interference with, while discharging his duty—Interference by one not a party to the suit if contempt—Strangers to the suit, duty of, when affected by order appointing Receiver—Practice in contempt matter—Affidavit.* The right of a stranger in possession to continue in possession is not affected by the order appointing a Receiver, but the fact of his possession does not give him the privilege to interfere with the Receiver directed to take possession of the property. His proper course is to apply to the Court for the redress of his grievance. If he interferes with the Receiver he does so at his peril. The Court will not permit a Receiver appointed by its authority to be interfered with or dispossessed of the property he is directed to receive

CONTEMPT OF COURT—*concld.*

by any one, although the order appointing him may be perfectly erroneous. The Court requires and insists that application should be made to the Court for permission to take possession of any property of which the Receiver either has taken possession or is directed to take possession. *Ames* v. *The Trustees of the Birkenhead Docks, 29 Beav. 353,* followed. RAI CHAUDHURI *v.* NOLINI PROKAS SEN (1913) . . . **18 C. W. N. 289**

CONTEMPT OF HIGH COURT.

See CONTEMPT OF COURT.
I. L. R. 41 Calc. 173

CONTINGENT BEQUEST IN FUTURO.

See HINDU LAW—WILL.
I. L. R. 41 Calc. 642

CONTINUING BREACH.

See UNITED PROVINCES MUNICIPALITIES ACT (I OF 1900), S. 147.
I. L. R. 36 All. 430

CONTRACT.

See CAUSE OF ACTION.
I. L. R. 41 Calc. 825

See EMBANKMENT.
I. L. R. 41 Calc. 130

See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SCH. II, ART. 3.
I. L. R. 37 Mad. 533

——————— **breach of, to deliver goods at a particular time—**

See CONTRACT ACT (IX OF 1872), SS. 39, 55, 63, 73 . . **I. L. R. 37 Mad. 412**

——————— **by bought and sold notes—**

See ARBITRATION **I. L. R. 41 Calc. 35**

1. ——————— *Carriage of goods on inland waters of Lower Burma—Receipt for goods shipped on cargo boats plying on river Irrawaddy—So-called mate's receipts not negotiable documents, nor documents of title—Transfer of Property Act (IV of 1882), s. 137—Rate Circular issued by shipowners—Delivery by them of cargo without production of mate's receipt—Liability of Shipping Company.* The plaintiffs (appellants) advanced money to the first defendant under an agreement by which the money was to be employed in purchasing paddy to be stored in the plaintiffs' godown at Dounggyi, and thence to be taken to Rangoon for sale. The agent of the first defendant at Dounggyi induced the plaintiffs' agent to allow the paddy to be shipped to Rangoon in boats belonging to the second defendant Company in the name of the first defendant as shipper. Eleven boat-loads in all were sent in respect of eight of which the first defendant paid the money to the plaintiffs' nominee at Rangoon. In respect of the cargoes of the last three boats the agent of the first defendant endorsed and delivered to the plaintiffs what purported to be mate's receipts for the cargoes loaded. The first defendant sold the cargoes, obtained delivery of

CONTRACT—*contd.*

the paddy from the defendant Company without producing the mate's receipts which the Company's agents had given for the paddy and delivered the paddy to the purchasers, paying nothing to the plaintiffs. In a suit against the first defendant for the amount due for advances, and against the defendant Company for damages for that amount on the ground that the Company's agents had delivered the paddy to the first defendant without production by him of the mate's receipts, and that their doing so was in breach of a representation which the Company made to the public by a printed Rate Circular or Notice, and by their usual course of business, that delivery of cargo carried by the Company's boats would only be made to persons holding mate's receipts for the cargo. *Held* (affirming the decision of the Chief Court of Lower Burma), that the receipt was not bill of lading, nor a mate's receipt, and not a negotiable instrument; nor was it a document falling within s. 137 of the Transfer of Property Act (IV of 1882), and therefore not a negotiable document in the sense of that section. It was merely a simple ordinary receipt for goods, and not a document of title upon the transfer of which the goods passed. *Held*, also, that the clause in the defendant Company's circular that "mate's receipts must be given up before discharge is allowed to commence, or in the event of the mate's receipt not having come to hand, the Company's usual guarantee must be signed," merely set forth a mode in which, in conducting their own business, the Company would protect themselves in the course of their trade, but did not constitute an obligation upon which the plaintiffs were entitled to found any liability on the part of the Company if the clause was not strictly complied with. There was therefore no document constituting a contract, and no course of business from which a contract could be inferred between the plaintiffs and the defendant Company. Nor was there any failure of duty on the part of the Company in delivering the goods without production of the mate's receipt by reason of the knowledge that the plaintiffs had rights against the shipper, because the evidence in the case showed that these rights had been the subject of negotiation and settlement, which resulted in the plaintiffs consenting to the goods being forwarded in the name of the first defendant, to whom they were therefore rightly delivered. NATCHEAPPA CHETTY *v.* IRRAWADDY FLOTILLA COMPANY (1913) . . **I. L. R. 41 Calc. 670**

2. ———— *Illegality—Promissory-note executed for compounding a charge of grievous hurt, if valid—Practice—Revision—Grounds of interference—Moral as opposed to legal justice—Mere errors of procedure, or technical defects.* Where a promissory-note was executed as consideration for compounding a charge of grievous hurt against a person who had died previous to the complaint, *Held*, that, as the offence could not be compounded except with the consent of the person to whom the grievous hurt was caused, the agreement to pay money, evidenced by the promissory-note, was

CONTRACT—*concld.*

illegal, and the promissory-note was consequently unenforceable. The fact that the complainant may have a right to claim damages for the injury caused to the deceased would make no difference, unless such right had been set up and proved. The High Court as a Court of Revision has no power to consider justice apart from such justice as the law recognises. *Sheikh Nubbee Buksh* v. *Bebee Hingon, 8 W. K. 412*, referred to. MOTTAI *v.* THANAPPA (1914) . **I. L. R. 37 Mad. 385**

3. ———— *Minor—Minor's rights over property purchased for his benefit by maternal uncle—Sale of such property by father, invalid.* Where certain immoveable property was purchased for the benefit of a minor by his maternal uncle, and was subsequently sold by the minor's father, as if it belonged to the joint family of which himself and the minor were members: *Held*, in a suit by the minor after attaining majority to recover the property from the alienee, that the sale for the benefit of the minor was valid, and he was entitled to recover. *Kulla Panditha*n v. *Ramayi, Second Appeal No. 881 of 1909*, followed. *Kamta Prasad* v. *Sheo Gopal, I. L. R. 26 All. 342, Ulfat Rai* v. *Gauri Shankar, 8 All. L. J. 670*, and *Meghan Dube* v. *Pran Singh, I. L. R. 30 All. 63*, referred to. The essential fact which renders void a transaction by a minor is that some agreement by the minor is necessarily an essential part of the transaction. But when a contract by the minor is not a necessary condition for upholding his right in property, his right should be maintained. *Mohori Bibee* v. *Dharmodas Ghose, I. L. R. 30 Calc. 539, Navakotti Narayana Chetty* v. *Logalinga Chetty, I. L. R. 33 Mad. 312*, referred to. MUNIA *v.* PERUMAL (1914) . . **I. L. R. 37 Mad. 390**

CONTRACT ACT (IX OF 1872).

———— **ss. 2** (*d*), **62**—

See DEBTOR AND CREDITOR.
I. L. R. 41 Calc. 137

———— **ss. 4, 61 and 103**—*Transfer of Property Act (IV of 1882), s. 137—Stoppage in transit Instruments of title—Railway receipts, effect of assignment of.* *A*, from Bagalkote, consigned to *B* at Bombay certain consignments of bales of cotton. These consignments *A* entrusted to the Madras and Southern Mahratta Railway at Bagalkote for conveyance to Bombay, which was effected by rail as far as Murmagoa on the lines of that Company and afterwards from Murmagoa to Bombay by sea by ships of the Bombay Steam Navigation Company. The Railway Company issued in respect of these consignments receipts to *A* which *A* handed over to *B* as the consignee of the goods in exchange for hundies for the amount of the value of the goods drawn by *B* in favour of *A*. These railway receipts contained, *inter alia*, the following condition:—"That the railway receipt given by the Railway Company for the articles delivered for conveyance must be delivered up at destination by the consignee to the Railway Company or the Railway may refuse to deliver

CONTRACT ACT (IX OF 1872)—*contd.*

s. 4—*contd.*

and that the signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery. If the consignee does not himself attend to take delivery he must endorse on the receipt a request for delivery to the person to whom he wishes it made and if the receipt is not produced the delivery of the goods may at the discretion of the Railway Company be withheld until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the Railway Company." While the goods were in transit and in the possession of the Bombay Steam Navigation Company, *B* became insolvent and some of the hundies given by him to *A* in respect of the goods in transit were dishonoured. *A* thereon purported to stop the goods and gave the Steamship Company instructions not to deliver them to *B* but to *C*. In the meantime *B* had borrowed monies from *D* and *E* and had transferred to *D* and *E* respectively the railway receipts for certain of these consignments as security. On the arrival of the bales at Bombay, they were claimed by *D* and *E* respectively and also by *C*. The Bombay Steam Navigation Company filed two suits, one against *A*, *B* and *D* and the other against *A* and *E*, claiming that the defendants in each suit might be restrained from taking proceedings against the plaintiff Company in relation to the bales, and that the defendants in each suit might be required to interplead together concerning their claim to the goods in question in such suit. *Held*, that reading section 103 of the Contract Act in conjunction with section 137 of the Transfer of Property Act (as provided for by section 4 of the Transfer of Property Act) railway receipts must be taken to be mercantile documents of title fulfilling one or other of the conditions specified in the explanation to section 137 of the Transfer of Property Act, *viz.*, proving in the ordinary course of business the possession or control of goods, or authorising or purporting to authorise either by endorsement or delivery the possessor of the document to transfer or receive the goods thereby represented, and that under the third condition of the railway receipts in question it was clear that those documents fell under the latter class. *Great Indian Peninsula Railway Company* v. *Hanmandas Ramkison and Virji Hansraj, I. L. R. 14 Bom. 57*, not followed. Simultaneously with these suits *D* had filed a suit against *A* and *B* to recover the monies advanced by him against the railway receipts transferred to him. Subsequently the entries in the general account of *B* in *D*'s books showed that various sums were credited to *B* which, if the rule laid down in section 61 of the Contract Act were applied, would extinguish that debt. *Held*, that the intention of *D* as indicated by his suit to enforce his claim against the proceeds of the bales of cotton covered by the railway receipts in question negatived the application of the rule. *Held*, accordingly, that *D* and *E* were respectively entitled to the benefit of section 103 of the Contract Act as against *A* and,

CONTRACT ACT (IX OF 1872)—*contd.*

s. 4—*concld.*

the bales having been sold, that the persons in whose hands the sale-proceeds were should hand over the net sale-proceeds to *D* and *E*, deducting any charges justly due. AMERCHAND & Co. *v.* RAMDAS VITHALDAS (1913) . **I. L. R. 38 Bom. 255**

s. 23—*Contract between third parties for the payment of money on the failure of a marriage void as opposed to public policy.* An arrangement between *A* and *B*, that *B*'s daughter shall marry *A's* son and that, if she fails to do so, *B* shall pay a sum of money to *A*, is opposed to public policy and void under section 23, Indian Contract Act (IX of 1872). *Venkata Kristnayya* v. *Lakshmi Narayana, I. L. R. 32 Mad. 184*, applied. *Hermann* v. *Charlesworth*, [*1905*] *2 K. B. 123*, referred to. *Purtamdas Tribhovandas* v. *Purshotamdas Mangaldas, I. L. R. 21 Bom. 23*, explained. DEVARAYAN *v.* MUTTURAMAN (1914)

I. L. R. 37 Mad. 393

s. 28—*Limitation Act (IX of 1908), s. 3—Insurance—Agreement in restraint of legal proceedings—Modification of the law of limitation by agreement of the parties—Rights and remedies, distinction between—Conditional release or forfeiture not invalid.* The S. Insurance Co. granted a policy of insurance against fire to the B. Co. on certain property of the latter, the policy containing a clause to the effect that if a claim were made and rejected and an action or suit were not commenced within three months after such rejection, all benefit under the policy should be forfeited. Damage was caused to the property of the B. Co. thus insured and a claim was made by that company of the S. Insurance Co. which was rejected by the latter. More than three months after such rejection the B. Co. filed a suit against the S. Insurance Co. to recover the amount of their claim. *Held*, that there is a distinction between the extinction of a right and the loss of a remedy, that section 28 of the Contract Act was aimed only at covenants not to sue at any time and at covenants not to sue for a limited time, that a conditional release or forfeiture was a very different thing from a covenant not to sue, although to avoid circuity of action a covenant not to sue had sometimes been held equivalent in effect to a conditional release, and that the condition of forfeiture in the policy in question in the suit was not within the scope of section 28 of the Contract Act. The correctness of the decision in *Hirabhai* v. *Manufacturers Life Insurance Co., 14 Bom. L. R. 741*, doubted. *Per* BATCHELOR, J. As I understand the matter, what the plaintiff was forbidden to do was to limit the time within which he was to enforce his rights; what he has done is to limit the time within which he is to have any rights to enforce; and that appears to me to be a very different thing. BARODA SPINNING AND WEAVING COMPANY, LTD. *v.* SATYANARAYEN MARINE AND FIRE INSURANCE COMPANY, LTD. (1913)

I. L. R. 38 Bom. 344

CONTRACT ACT (IX OF 1872)—*contd.*

s. 30—*Wagering contract—Purchase of grain pit through agent—Intention of parties.* The plaintiffs, who were commission agents, purchased for the defendants at their request a grain pit. The defendants, however, did not pay the price agreed upon and the plaintiffs resold the pit at a loss. They then sued the defendants to recover the loss on the resale of the pit and their commission. *Held*, that whether or not it might have been the intention of the parties that the grain pit should be resold as it was, the defendants making a profit or bearing a loss on the transaction, the transaction between the parties was not a wagering contract within the meaning of section 30 of the Contract Act. *Forget* v. *Ostigny*, [*1895*] *A. C. 318*, and *Jagat Narayan* v. *Sri Kishan Das*, *I. L. R. 33 All. 219*, followed. BISHESHAR DAYAL *v.* JWALA PRASAD (1914)
I. L. R. 36 All. 426

ss. 39, 55, 63 and 73—*Breach of contract to deliver goods at a particular time—Damages, measure of—Time at which damages should be computed.* A contract to deliver goods within a certain period is broken by non-delivery before its expiry, in the absence of an agreement between the parties to extend the time for performance. The measure of damages in such a case is the difference between the contract rate and the market rate at the expiry of the period agreed upon as the time for delivery in the contract. *Per* WHITE, C. J. Section 63 of the Contract Act does not entitle a *promisee* for his own purposes and without the consent of the *promisor* to extend the time for performance which had been agreed to by the parties to the contract. Nor does section 55 enable him to keep alive a broken contract in the hope of being able to recover heavier damages for its breach. *Ogle* v. *Earl Vane*, *L. R. 2 Q. B. 275, 284*, and *Ashmore & Co.* v. *Cox & Co.*, [*1899*] *1 Q. B. 43*, explained, *Nickoll & Knight* v. *Ashton, Edridge & Co.*, [*1900*] *2 Q. B. 228*, and *Roth* v. *Taysen*, *1 Com. Cas. 306*; *s. c. 73 L. T. 628*, referred to. *Per* AYLING, J.—Section 63 deals only with concessions on the part of the *promisee* advantageous to the *promisor*, and cannot be invoked to support an extension of time by the *promisee* for his own benefit. Section 55 read with section 2 (i) means nothing more than this: on the *promisor's* failure to perform within the contract time, the *promissor* loses the power to enforce the contract, that is, to claim any advantage due to himself thereunder. The *promisee* has the option of enforcing it or not as it may suit him, and if he elects to enforce the contract he can, under section 73, obtain only such damages as naturally arose in the usual course of things from the breach or the parties knew, when they made the contract, to be likely to result, which cannot include any aggravation of damages caused by the *promisee's* action or inaction subsequent to the breach. MUTTHAYA MANIAGARAN v. LEKKU REDDIAR (1914) . . **I. L. R. 37 Mad. 412**

s. 55—*Contract, when time of the essence of—Contract for the assignment of leasehold property,*

CONTRACT ACT (IX OF 1872)—*contd.*

s. 55—*concld.*

effect of the insertion of a definite date for completion and payment of the purchase money with conditions as to forfeiture of the earnest money and liberty for the vendor to re-sell—Certificate of lessor that conditions of lease have been complied with not necessary. *C* agreed to sell to *I* his interest in a property, held on lease from the Secretary of State for India, on certain conditions as to improvement for cultivation, etc., and as to not assigning or underletting the lands until these conditions had been carried out without the consent in writing of the Collector of Thana, for Rs. 85,000, of which Rs. 4,000 was paid on the execution of the agreement and it was agreed that Rs. 80,500 should be paid on the signing of the conveyance, which was to be prepared and received within 2 months from the date of the agreement, and Rs. 500 on the transfer of the land after the conveyance should have been registered. It was further provided that should *I* not have paid the amount of the purchase money within the time fixed then he should forfeit his right to the earnest money and *C* should be at liberty to re-sell the property. *Held*, that under the agreement time was of the essence of the contract. *Held*, further, that *I* could not insist on *C* procuring a certificate from the Collector of Thana that all the conditions of the lease from the Secretary of State for India had been complied with. BURJORJEE DHUNJIBHOY *v.* JAMSHED KHODARAM (1913)
I. L. R. 38 Bom. 77

ss. 62, 63—

See ARBITRATION **I. L. R. 41 Calc. 35**

s. 65—*Agreement discovered to be void—Compensation, payment of—Bhagdari Act (Bom. Act V of 1862)—Alienation of unrecognised subdivision of a bhag—Valatdana patta.* In 1902 the plaintiff executed a *valatdana patta* of lands forming an unrecognised sub-division of a *bhag*, in favour of defendants who were put in possession. The deed contained a personal covenant whereby the plaintiff bound himself to give compensation to the defendants in case their possession was obstructed. In 1910, the plaintiff sued to recover possession of the property by redeeming the *valatdana patta* which he alleged was a mortgage. The lower Courts held that the alienation was void under the provisions of the Bhagdari Act (Bom. Act V of 1862); and following the decision of *Jijibhai* v. *Nagji*, *11 Bom. L. R. 693*, ordered that the plaintiff could recover possession on payment of moneys he had received from the defendants. The plaintiff having appealed: *Held*, that the order of compensation against the plaintiff was justified, inasmuch as the agreement was discovered to be void within the meaning of section 65 of the Indian Contract Act (IX of 1872) long after the transaction, and as there was a personal covenant in the agreement. *Per* SHAH, J. Neither under section 65 of the Indian Contract Act nor under the ruling in *Jijibhai* v. *Nagji*, *11 Bom. L. R. 693*, is the Court bound to award

CONTRACT ACT (IX OF 1872)—*contd.*

———— **s. 65**—*concld.*

compensation in all cases as a matter of course where a document is found to be void in consequence of the provisions of the Bhagdari Act. It has to be considered in each case whether the agreement is discovered to be void and whether any person has received any advantage under such agreement as required by section 65 or whether the covenant in each particular case justifies the order of compensation. The amount of compensation also has to be determined with reference to the circumstances of each particular case. HARIBHAI HANSJI *v.* NATHUBHAI RATNAJI (1913) . . . **I. L. R. 38 Bom. 249**

———— **s. 69**—"*Interest in the payment*," *meaning of—Decree against Hindu widow and sale of husband's estate—Sale set aside by reversionary heir by deposit under s. 310A, Civil Procedure Code (XIV of 1882)—Suit to recover deposit from widow—Payment, if voluntary, if decree in law appears to bind widow personally.* Where by a deposit duly made under s. 310A of the Civil Procedure Code of 1882 the reversionary heir expectant upon the death of a Hindu widow in possession of her husband's estate as his heiress, had a sale in execution of a decree for arrears of rent of properties other than the defaulting tenure set aside, and then sued the widow for recovery of the amount deposited: *Held*, that as the decree-holder professed to sell the entire interest in the properties sold and the auction-purchaser also claimed to have acquired the entire interest, the reversionary heir was "interested in the payment" of the decretal amount which the widow "was bound by law to pay"—within the meaning of s. 69 of the Contract Act. Until the sale is confirmed, the judgment-debt remains unsatisfied, and it is in satisfaction of the judgment-debt that the payment under s. 310A (excluding the portion which represents damages payable to the execution purchaser) is made. The question whether in point of law the reversionary interest was or was not touched by the sale, being a matter for serious controversy, the payment could not be viewed as a voluntary payment. The words "interested in the payment of money which another is bound by law to pay" may include the apprehension of any kind of loss or inconvenience and not merely the actual detriment capable of assessment in money. S. 69 thus lays down a more comprehensive rule than is supported by English authority. PANKHABATI CHAUDHURANI *v.* NANI LAL SINGH (1913) **18 C. W. N. 778**

———— **ss. 69, 70**—*Contribution, suit for—Co-sharer under-raiyats—Sale by one to the other not recognised by landlord—Decree for rent against both discharged by vendor—Right to recover. A* and *B* were under-raiyats in respect of a non-transferable holding. *B* transferred his share to *A* in 1904. The transfer was not recognised by their landlord. The landlord obtained a decree in a suit for arrears of rent against *A* and *B* in respect of the years

CONTRACT ACT (IX OF 1872)—*concld.*

———— **ss. 69, 70**—*concld.*

1902—05, whereupon *A* satisfied the decree and brought a suit for contribution against *B*. *Held*, that s. 69 of the Cortact Act is applicable to the present case and *B* is bound to make compensation to *A*. *Held*, further, even assuming that s. 69 has no application, s. 70 undoubtedly covers the case. PROSUNNO KUMAR BOSE *v.* JAMALUDDIN MAHOMED (1912) . . . **18 C. W. N. 327**

———— **s. 236**—*Contract of sale—Person purporting to contract for undisclosed principal where no such principal exists, if entitled to enforce performance.* A person who purports to contract for an undisclosed principal where no such principal exists, is not entitled to enforce the performance of it. RAMJI *v.* JANKI DAS (1912) **18 C. W. N. 263**

———— **s. 237**—

See COMPANIES ACT (VI OF 1882), SS. 76,77. **I. L. R. 36 All. 416**

———— **s. 251**—

See LIMITATION ACT (IX OF 1908), SS. 19, 20 . . **I. L. R. 37 Mad. 146**

CONTRACT FOR SALE.

See SALE . . **I. L. R. 41 Calc. 148**

CONTRACT OF SERVICE.

See TRUST . . **I. L. R. 41 Calc. 19**

CONTRACT WITH GOVERNMENT.

See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SCH. II, ART. 3. **I. L. R. 37 Mad. 533**

CONTRIBUTION.

See TRANSFER OF PROPERTY ACT (IV OF 1882), S. 82 **I. L. R. 36 All. 272**

———— *amongst joint tort-feasors—Decree against plaintiffs and defendants for mesne profits—Tort not wilful—Plea that plaintiffs sole wrong-doers to be specially pleaded and made a special issue. Held*, that, on the facts of the case, the paintiffs and defendants against whom as zemindars of estate *A*, a decree for possession and mesne profits had been passed in favour of zemindars of estate *N*, were not wilful tort-feasors—even if the strict law of *Merryweather* v. *Nixam, 8 T. R. 186*, were applicable in India—and *primâ facie* the plaintiffs who paid the whole of the decretal amount in a proceeding under s. 310A, Civil Procedure Code, were entitled to contribution as against the defendants. In such a suit for contribution, a plea that the plaintiffs were the only wrong-doers in the sense that they alone were in possession of the land in respect of which mesne profits were awarded, is of such a special nature and requires such special consideration that it should be distinctly pleaded and made the subject of a distinct issue. *Dering* v. *Winchelsea, 1 Cox 318*, referred to. BISHNU CHARAN ROY CHAUDHURY *v.* BEPIN CHANDRA ROY CHAUDHURI (1913) . . . . **18 C. W. N. 622**

CONTRIBUTORY.

See COMPANY .. **I. L. R. 36 All. 412**

CONTRIBUTORY NEGLIGENCE.

——————————*Railway Company—Collision—Damages.* The plaintiff's carriage was damaged by a train of the defendant Company running into it at a level-crossing where the gate had been left open. *Held*, that, on the findings of fact by the lower Appellate Court, negligence on the part of the defendant Company had been established, and that contributory negligence had not been proved. BENGAL PROVINCIAL RAILWAY Co. *v.* GOPI MOHAN SINGH (1913) **I. L. R. 41 Calc. 308**

CONVENIENCE.

See JURISDICTION. **I. L. R. 41 Calc. 305**

CONVERSION.

See CARRIERS .. **I. L. R. 41 Calc. 703**

CONVICTION.

See THEFT . **I. L. R. 41 Calc. 433**

COPYRIGHT.

——————————*Law Reports—Indian Copyright Act (III of 1914)—Copyright Act (1 & 2 Geo. V, c. 46)—Reports of judgment, copyright in—Selection of judgments, copyright in—Judgments obtained by expenditure of time, labour, or money by one, if may be reproduced by another—Extracts from judgments and facts taken from record, copyright in—Common source of information, reference to—Injunction, perpetual—Pirated matter, direction for delivery and destruction—Damages, assessment of.* It is generally true that in the reports of judgments, the reporter has no copyright, but it cannot be said that in the selection of cases and in the arrangements of the reporting, the reporter has not the protection of law. One is entitled to report such judgments as he obtains by expenditure of his time, labour, money, but when he fails to exert his own energies, he cannot be allowed to avail himself of other peoples' industry. Nor will he be allowed to take quotations from judgments or facts obtained by another from the records of a case. The principle is that whilst all are entitled to resort to common sources of information, none are entitled to save themselves trouble and expense by availing themselves for their own profit of other men's works, subject to copyright and entitled to protection. *Lewis* v. *Fullerton, 2 Beav. 6, 8,* followed. JOGESH CHANDRA CHAUDHURI *v.* MOHIM CHANDRA RAI (1914) **18 C. W. N. 1078**

COPYRIGHT ACT (III OF 1914).

See COPYRIGHT . **18 C. W. N. 1078**

COSTS.

See CONTEMPT OF COURT. **I. L. R. 41 Calc. 173**

See DIVORCE ACT (IV OF 1869), SS. 2, 4, 7 AND 45 . **I. L. R. 38 Bom. 125**

COSTS—*concld.*

See PLEADER'S FEE. **I. L. R. 41 Calc. 637**

COURT-FEE.

See CIVIL PROCEDURE CODE (1882), SS. 268, 278, 283. **I. L. R. 38 Bom. 631**

See COURT-FEES ACT (VII OF 1870), S. 7 (IX), SCH. I, ART. 1. **I. L. R. 36 All. 40**

See COURT-FEES ACT (VII OF 1870), SCH. I, ART. I . **I. L. R. 36 All. 322**

See COURT-FEES ACT (VII OF 1870), CL. IV **I. L. R. 36 All. 500**

See GHATWALI TENURES. **I. L. R. 41 Calc. 812**

——————————*deficit, not due to mistake—Extension of time if proper—Limitation.* When an order allowing a plaintiff to deposit deficit court-fees has been made and complied with no question of limitation can be raised. But it is not proper for a Court to extend the period of limitation allowed by law to the prejudice of defendants, by giving the plaintiff time to deposit deficit court-fees when there is no question of any mistake merely to suit the convenience of the plaintiff. SAMBHO KUOR *v.* HARIHAR PERSHAD (1914) **18 C. W. N. 1071**

COURT-FEES ACT (VII OF 1870).

—————— **s. 7, cl. (iv)—**

——————————*Court fee—Suit for declaration and consequential relief—Valuation for purposes of court-fee.* A prior mortgagee brought a suit upon his mortgage and obtained a final decree for sale to realize Rs. 6,818-12-5. A puisne mortgagee of part of the property covered by this decree, who had not been made a party to the prior mortgagee's suit, subsequently brought a suit against the prior mortgagee asking, *first*, for a declaration that the defendant was not entitled to bring to sale in execution of his decree the property comprised in the plaintiff's mortgage; and, *secondly*, for an injunction restraining the defendant from bringing the said property to sale. The first relief was valued at the amount of the defendant's decree, namely, Rs. 6,818-12-5, and a court-fee of Rs. 10 was paid in respect of it. The second relief was valued at Rs. 100 only and a court-fee of Rs. 7-8-0 was paid. *Held*, that the plaintiff was bound to pay an *ad valorem* fee on the amount at which the suit was valued, namely, on Rs. 6,818-12-5. JAGESHAR *v.* DURGA PRASAD SINGH (1914) **I. L. R. 36 All. 500**

—————— **s. 7, cl. (v), sub-cls.** (*a*), (*c*), (*d*)—

See GHATWALI TENURES. **I. L. R. 41 Calc. 812**

—————— **s. 7, cl. (ix) ; Sch. I, Art. 1—**

——————————*Suit for redemption or foreclosure of mortgage—Appeal—Court-fee.* The criterion laid down in section 7 (ix) of the Court-

COURT-FEES ACT (VII OF 1870)—*contd.*

——— **s. 7**—*concld.*

Fees Act, 1870, for determining the court-fee payable in respect of a suit for redemption or foreclosure of a mortgage does not apply to the appeal in such a suit. In the case of appeals or cross-objections in suits for redemption or foreclosure, in all cases in which the amount declared by the Court to be due at the date of the decree can be ascertained by reference to the judgment and the decree, it is that amount at which the appeal or cross-objections should be valued, and future interest should not be taken into account. The rule in *Baldeo Singh* v. *Kalka Prasad, I. L. R. 35 All. 94*, modified. RAGHUBIR PRASAD *v.* SHANKAR BAKHSH SINGH (1913) . **I. L. R. 36 All. 40**

——— **Sch. I, Art. 1**—

———*Court-fee—Subject-matter in dispute in appeal—Suit for possession—Defence of lien for dower—Appeal by defendant.* In a suit for recovery of property in the possession of a Mahomedan lady the defendant pleaded, *first*, that the plaintiff had no title ; and, *secondly*, that she was not entitled to a decree for possession without payment to the defendant of Rs. 80,000, the amount of dower due to the defendant. The Court of first instance decreed the suit for possession holding that payment of the defendant's dower, whatever it might amount to, was not a condition precedent to the plaintiff's obtaining a decree. The defendant appealed, paying court-fees on the value of the property. On a reference by the taxing officer as to whether she was liable to pay court-fees on Rs. 80,000 as well : *Held*, that the subject-matter in dispute in the appeal was the property of which possession was sought and that the court-fee paid was sufficient. HAIDARI BEGAM *v.* GULZAR BANO (1914) . **I. L. R. 36 All. 322**

——— **Sch. I, Art. 11, s. 191, and Sch. III, Annex. A and B, s. 5**—

———*Probate duty, assessment—"Value of property," meaning of—Construction of Statute.* Sch. III, Annexures A and B, of the Court-Fees Act make it clear that the duty payable at an application for probate or letters of administration under Sch. I, Art. 11, of the Act is to be calculated upon the net value of the estate obtained by the deduction of the amount of debts from the gross value of the estate. *Collector of Maldah* v. *Nirode Kamini Dassy, 17 C. W. N. 21*, may require re-examination and further consideration. The interpretation of the expression "value of property" in Sch. I, Art. 11, as the "market value" of property or the value of the entire property less the amount of encumbrance, is the reasonable construction of the expression. The true mode of interpreting a Statute like the Court-Fees Act which has been repeatedly amended, is not to consider individual sections, but to take them as a whole and to give effect to the legislative intent upon a particular matter. *In the goods of* KERR (1913) . . . **18 C. W. N. 121**

COURT-FEES ACT (VII OF 1870)—*concld.*

——— **Sch. II, Art. 6**—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 269 **I. L. R. 37 Mad. 17**

COURT-FEES AMENDMENT ACT (XI OF 1899).

——— **s. 19H, sub-ss. 3, 4**—*Limitation for proceedings of Collector where he thinks the value of an estate has been under-estimated—Form of inventory of estate to be exhibited and filed in Court—"Full and true estimate of property"—Probate and Administration Act (V of 1881), s. 98—Inventory accepted as sufficient by former Judges of Court.* In the matter of an application for letters of administration with the will annexed the period of limitation in the proviso to sub-section 4 of section 19H of Act XI of 1899 (amending the Court-Fees Act, 1870) for the proceedings of a Collector who has reason to believe that the valuation of an estate has been under-estimated, does not begin to run until an inventory under section 98 of the Probate and Administration Act (V of 1881) has been exhibited and filed in the proper Court ; and according to the last-named section the inventory required is declared to be a "full and true estimate of the property" in possession of the person applying for letters of administration. *Held*, that such an estimate was not furnished by the exhibition and filing of a document (in this case a list of the immoveable property of the deceased) which required to be supplemented by a reference to various other documents in order to ascertain the valuation of the property notwithstanding it had been accepted as such an inventory as the law required by previous holders of the office of Judge of the Court in which it was filed. BHUBANESWARI KUMAR *v.* COLLECTOR OF GAYA (1913)
I. L. R. 41 Calc. 556

COURT OF RECORD.

See CONTEMPT OF COURT.
I. L. R. 41 Calc. 173

COURT OF SESSION.

——— **committal to**—

See CRIMINAL PROCEDURE CODE, s. 213.
I. L. R. 38 Bom. 114

COURT OF WARDS.

See CIVIL COURTS ACT (XIV OF 1869), s. 32 . . **I. L. R. 38 Bom. 662**

See EXECUTION OF DECREE.
I. L. R. 38 Bom. 662

See UNITED PROVINCES COURT OF WARDS ACT (III OF 1899), s. 48.
I. L. R. 36 All. 331

COURT OF WARDS ACT (BENG. IX OF 1879).

——— **ss. 48, 60A.**—*Decree obtained against ward before estate taken over, if*

COURT OF WARDS ACT (BENG. IX OF 1879)—*concld.*

s. 48—*concld.*

may be executed in the ordinary manner. A decree obtained against the ward before his estate came under the management of the Court of Wards can be executed against the ward's property in the hands of the Court of Wards in the usual manner under the provisions of the Civil Procedure Code without reference to the order, in which, under s. 48 of the Court of Wards Act, the manager is directed to satisfy the ward's liabilities out of the free funds at the manager's disposal. UPENDRANATH SEN ROY CHOWDHURY *v.* BIMALA KANTA SEN CHOWDHURY (1914) . **18 C. W. N. 1055**

COURT OF WARDS ACT (BOM. I OF 1905).

ss. 31, 32—*Section 32 of the Court of Wards Act (Bom. Act I of 1905) not retrospective.* Section 32 of the Court of Wards Act (Bom. Act I of 1905) was not intended to apply to pending suits. In terms it refers to suits "brought by or against" a Government ward. Section 32 must be read with section 31 which provides that before such a suit is brought notice shall be delivered to, or left at, the office of the Court of Wards. Thus section 32 does not apply to suits pending at the time of the assumption of superintendence of the ward's estate by the Court of Wards. HARI GOVIND *v.* NARSINGRAO KONHERRAO (1913) . **I. L. R. 38 Bom. 194**

CREDITOR.

See FRAUD . **I. L. R. 38 Bom. 10**

See PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), s. 17.
I. L. R. 38 Bom. 359

assignment to defeat.

See DECREE, ASSIGNMENT OF.
I. L. R. 37 Mad. 227

CRIMINAL BREACH OF TRUST.

Property and its sale-proceeds—Charge relating to property, but conviction of misappropriation of the sale-proceeds—Legality of conviction—Absence of dishonest intention at the date of the sale—Penal Code (Act XLV of 1860), ss. 405, 409. S. 405 of the Penal Code does not cover misappropriation by a person of the sale-proceeds of the property entrusted to him. A person charged with criminal breach of trust of certain property entrusted to him cannot be convicted of embezzling, not the property, but the amount obtained by dealing with it. *Bipra Das Giri* v. *Niradamoni Bewa, 12 C. W. N. 577,* followed. But assuming that "property," in s. 405 of the Penal Code, includes the value thereof, *viz.*, its sale-proceeds, a person cannot be said to have disposed of the property or the sale-proceeds, in violation of his contract, dishonestly, unless it is shown that he had the intention of dishonestly appropriating the sale-proceeds on the date of the sale, of which there was no evidence in the case. An auctioneer is not liable for criminal breach of trust merely because he does not punctually carry out every term in the agreement, *e.g.*, as to the date of the sale and the time of payment of the proceeds. BALTHASAR *v.* EMPEROR (1914)
I. L. R. 41 Calc. 844

CRIMINAL CASES.

See PRIVY COUNCIL, PRACTICE OF.
I. L. R. 41 Calc. 1023

appeal in—

See PRIVY COUNCIL, PRACTICE OF.
I. L. R. 41 Calc. 568

CRIMINAL CONTEMPT.

See CONTEMPT OF COURT.
I. L. R. 41 Calc. 173

CRIMINAL INVESTIGATION DEPARTMENT.

See CONTEMPT OF COURT.
I. L. R. 41 Calc. 173

CRIMINAL PROCEDURE CODE (ACT V OF 1898).

ss. 4 (*t*), 195, 476, 492—

See SANCTION FOR PROSECUTION.
I. L. R. 41 Calc. 446

ss. 4 (*t*), 417, 492—

See PUBLIC PROSECUTOR.
I. L. R. 41 Calc. 425

s. 16—*Difference of opinion between Magistrates forming Bench, settlement of, by casting vote of Chairman—Act VII of 1912, s. 3, effect of, on notifications in force in Eastern Bengal and Assam—Act VII of 1905, s. 3, effect of—Notification of Local Government issued prior to 1905, application of, to Districts formerly in Eastern Bengal and Assam.* The notification issued by the then Government of Bengal under s. 16, Criminal Procedure Code, prior to 1905, that a difference of opinion between two Honorary Magistrates forming a Bench is to be settled by the casting vote of the Chairman, which was one of the notifications which were kept in force in the Province of Eastern Bengal and Assam by s. 3 of Act VII of 1905, still applies to the District of Faridpur under s. 3 of Act VII of 1912. ULFAT SHEIKH *v.* THE KING-EMPEROR (1913) . . . . **18 C. W. N. 394**

s. 17—*District Magistrate—Powers of Magistrate of the district as regards distribution of criminal work—Delegation. Held,* that s. 17 of the Code of Criminal Procedure does not empower a District Magistrate to delegate to the senior honorary Magistrate of the district the duty of distributing cases for disposal amongst the other honorary Magistrates and Benches. BAL KISHAN *v.* SIPAHI LAL (1914) . **I. L. R. 36 All. 468**

s. 54 (*1*)—"*Credible information*"—*Attempted arrest by police constable upon knowledge that a warrant of arrest for a cognizable offence was extant—Penal Code (Act XLV of 1860), s. 353.* A police constable having knowledge that

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 54**—*concld.*

a warrant of arrest in respect of a cognizable offence was outstanding against a certain person attempted to arrest such person and in so doing was assaulted and prevented from effecting the arrest. *Held*, that the existence of the warrant was equivalent to "credible information" that the person in question had been concerned in a cognizable offence, within the meaning of s. 54 (*1*) of the Code of Criminal Procedure, and that the persons preventing the arrest were properly convicted under s. 353 of the Indian Penal Code. *Queen Empress* v. *Dalip*, *I. L. R. 18 All. 246*, distinguished. EMPEROR *v.* GOPAL SINGH (1913) **I. L. R. 36 All. 6**

——— **s. 59**—

See ARREST BY PRIVATE PERSON. **I. L. R. 41 Calc. 17**

——— **s. 94**—*Summons may be issued under, to accused to produce document or thing.* Under s. 94, Criminal Procedure Code, a Magistrate has power to issue a summons to an accused person to produce a document or other thing even when its production might tend to incriminate him. *Mahomed Jackariah and Co.* v. *Ahmed Mahomed*, *I. L. R. 15 Calc. 169*, followed. *Ishwar Chandra Ghoshal* v. *The Emperor*, *12 C. W. N. 1016*, dissented from. KONDAREDDI, *Re* (1914) **I. L. R. 37 Mad. 112**

——— **ss. 94, 165**—

See SEARCH BY POLICE OFFICERS. **I. L. R. 41 Calc. 261**

——— **ss. 103, 309, 423**—

See DACOITY . **I. L. R. 41 Calc. 350**

——— **s. 106**—*Appellate Court, jurisdiction of, defined.* The jurisdiction of an Appellate Court to order a person who has been convicted of one of the offences mentioned in sub-s. (*1*) of s. 106, Criminal Procedure Code, is not restricted to cases where the conviction was by one of the Courts specified in the sub-section. The words "an Appellate Court" are quite general and the word "also" indicates that the powers given by that section may be exercised by the Courts mentioned in sub-s. (*1*) and by an Appellate Court. The words "under this section" in sub-s. (*3*) have reference to the powers given by that section and not to the Courts by which these powers are in the first instance exercisable. *Muthiah Chetty* v. *Emperor*, *I. L. R. 22 Mad. 190*, overruled. SOLAI GOUNDEN, *Re* (1914) . . . **I. L. R. 37 Mad. 153**

——— **s. 107**—*Evidence Act (I of 1872), s. 74—Notice under s. 107, Criminal Procedure Code, if a public document—Proof necessary for admission of such document in evidence.* A notice under s. 107, Criminal Procedure Code, is a public document within the meaning of s. 74 of the Evidence Act, but it cannot come in without proof that the parties mentioned in it are the parties concerned in the question at issue about

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 107**—*concld.*

which it is produced as evidence. AMJAD *v.* LACHMI KANTA JHA (1914) . **18 C. W. N. 644**

ss. 107 and 145—*Procedure—Appointment of chaudhri by traders using a market—Dispute as to chaudhri's dues between him and the servants of the zamindar.* The traders who frequented a certain market in a village of the Azamgarh district, which was owned by a lady residing in Benares, agreed amongst themselves to appoint a certain person as *chaudhri* of the market and to pay him for his services by means of a small contribution for each beast of burden which brought goods to the market. The servants of the owner, on the other hand, wished to obtain these payments for themselves, and it was found that they were ready to commit a breach of the peace in order to make good their alleged right thereto. *Held*, that the circumstances were not such as would warrant the taking of action under s. 145 of the Code of Criminal Procedure, but that s. 107 of the Code was the more appropriate section under which to proceed. EMPEROR *v.* RAM LOCHAN (1913) . . . . **I. L. R. 36 All. 143**

——— **ss. 107 and 250**—*Frivolous or vexatious complaint—Compensation—Application to Magistrate to bind over certain persons to keep the peace.* A person in respect of whom information has been laid before a Magistrate to the effect that he is likely to commit a breach of the peace or is otherwise liable to the provisions of s. 107 of the Code of Criminal Procedure, is not a person accused of any "offence." An order for payment of compensation cannot, therefore, be made against a man who has petitioned a Magistrate to take action under s. 107 of the Code. BINDHACHAL PRASAD RAI *v.* LAL BIHARI RAI (1914) **I. L. R. 36 All. 382**

——— **ss. 107, 526** (*8*)—

See TRANSFER **I. L. R. 41 Calc. 719**

ss. 110 (*d*), **112, 117**—

See SECURITY FOR GOOD BEHAVIOUR. **I. L. R. 41 Calc. 806**

——— **ss. 112 and 167**—*Security—Remand—Jurisdiction of Magistrate.* Where a Magistrate, in a case sent up by the police for action to be taken by the Magistrate under Chapter VIII of the Code of Criminal Procedure, passed an order remanding the persons concerned to police custody under s. 167, it was *held* that his action was *ultra vires*. Even if s. 167 applied at all to proceedings under Chapter VIII of the Code, no order could be passed under that section until the Magistrate had recorded an order under s. 112. *Empress* v. *Babua*, *I. L. R. 6 All. 132*, *In the matter of petition of Daulat Singh*, *I. L. R. 14 All. 45*, and *King-Emperor* v. *Paimal Nai*, *10 All. L. J. 351*, referred to. EMPEROR *v.* RAMESHWAR (1914) . **I. L. R. 36 All. 262**

——— **ss. 118 and 123**—*Security for good behaviour—Imprisonment in default not to include*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 118, 123**—*concld.*

solitary confinement. The imprisonment which a person may be ordered to undergo in default of furnishing security for good behaviour, cannot be made to include solitary confinement. EMPEROR *v.* KUNDAN (1914) . . **I. L. R. 36 All. 495**

——— **ss. 119 and 437**—*Security for good behaviour—"Release" or "discharge"—Competence of District Magistrate to order further inquiry under s. 437 against a person in whose favour an order under s. 119 has been passed. Held,* that a person who has been "released" or "discharged" under s. 119 of the Code of Criminal Procedure is so far in the position of "an accused person who has been discharged" within the meaning of s. 437 of the Code that it is competent to the District Magistrate to take further action against such a person under the last named section. Where, however, proceedings had twice been taken under s. 110 without result, and the District Magistrate had not given the person concerned any opportunity of showing cause against the order which might be passed, the proceedings were set aside. *Queen-Empress* v. *Ahmad Khan, All. Weekly Notes (1900), 206, Sheo Din* v. *King-Emperor, 6 O. C. 262, Muhammad Khan* v. *King-Emperor, P. R., Cr. 102, Velu Tayi Ammal* v. *Chidambarvelu Pillai, I. L. R. 33 Mad. 85, Queen-Empress* v. *Imam Mondal, I. L. R. 27 Calc. 662, Dayanath Taluqdar* v. *Emperor, I. L. R. 33 Calc. 8, Hopcroft* v. *Emperor, I. L. R. 36 Calc. 163, King-Emperor* v. *Fyaz-ud-din, I. L. R. 24 All. 148,* and *Queen-Empress* v. *Mutasaddi Lal, I. L. R. 21 All. 107, Queen-Empress* v. *Ratti, All. Weekly Notes (1899), 203,* referred to. EMPEROR *v.* KHARGA (1913) **I. L. R. 36 All. 147**

——— **s. 122**—

See SURETY . **I. L. R. 41 Calc. 764**

——— **s. 125**—*Security to keep the peace and power of the District Magistrate to cancel a security bond.* The District Magistrate has jurisdiction under s. 125, Criminal Procedure Code, to cancel a bond to keep the peace on the ground that on the facts its execution should not have been ordered. *Nabu Sardar* v. *Emperor, I. L. R. 34 Calc. 1,* followed. MARE GOWD, *Re.* **I. L. R. 37 Mad. 125**

——— **s. 133**—

1. ——— *Jurisdiction—Channel which may be lawfully used by the public—Field over which water from other fields at a higher level flows. Held,* that a field, which is on a lower level than the adjoining fields and over which the surplus water of those adjoining fields used to flow into a tank, even if it could be described as a channel, was not such a channel as had been or could lawfully be used by the public, and action could not be taken under s. 133 of the Code of Criminal Procedure, for the removal of any obstruction from it. *Jhunnu Singh* v. *Mata Autar, All. Weekly Notes (1906), 190,* and *In re Maharana Shri Jaswatsangji Fatesangji, I. L. R. 22 Bom. 988,* referred to. *Emperor* v. *Bharosa Pathak, I. L. R. 34 All. 345,* and *Zaffer Nawab* v. *Emperor, I. L. R. 32 Calc. 930,* distinguished. JAGARNATH SAHU *v.* PARMESHWAR NARAIN (1914) **I. L. R. 36 All. 209**

2. ——— *Claim of right, Magistrate's duty to decide bonâ fides of—Magistrate bound to refer parties to Civil Court if such claim is not mere pretence—Steps which Magistrate may take, if suit not instituted in Civil Court within reasonable time. Per* SHARFUDDIN, J. (TEUNON, J., *dubitant*). Sub-s. (*3*) of s. 133, Criminal Procedure Code, provides that no order duly made by a Magistrate under the section shall be called in question in any Civil Court. From this latter provision it is clear that the provision of s. 133, Criminal Procedure Code, should be sparingly used. Any order passed under the section cannot be questioned in any Civil Court. It is therefore necessary that if the party against whom the order is contemplated to be passed raises a question that the pathway is not a public property in the sense of the provision of this section, the Magistrate trying the case should be careful not only to decide as to whether the pathway in question is situated on a private land or if it is for public use, but he should, even when the claim of the objection is not substantiated, find whether the claim is *bonâ fide* or it is set up only to oust the jurisdiction of the Court. If the Magistrate finds that the claim which is set up is a mere pretence, he should then proceed to pass a final order and make the rule issued by him absolute. If, however, he finds that the claim, although not substantiated, is not a mere pretence and is not raised to oust the jurisdiction of the Court, but that it is raised *bonâ fide,* he should stay his hand and refer the party to Civil Court. And if the party within a reasonable time does not have recourse to Civil Court, the Magistrate may then proceed to make the rule absolute. MANIPUR DEY *v.* BIDHU BHUSAN SARKAR (1914) . . **18 C. W. N. 1086**

3. ——— *s. 133, scope of—Claim of right, Magistrate bound to determine bonâ fides of, before appointing jury—Case in which bonâ fide claim of right raised as also appointment of jury asked for—Duty of jury to hear parties and evidence.* S. 133, Criminal Procedure Code, contemplates only an enquiry as to the existence or non-existence of the obstruction complained of and not an enquiry into a disputed question of title, and where a *bonâ fide* claim of private right is raised, the Magistrate cannot make an order under the section, but should leave the determination of the question to the Civil Court. When once a party who raised a private right has asked for a jury and has had the case referred to the jury, the jury are bound to hear the parties and such witnesses as they may desire to be heard. When a second party to a proceeding under s. 133, Criminal Procedure Code, raises a question of

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 133**—*concld.*

private right and insists on having it decided, the Magistrate should look into the *bonâ fides* of that claim before submitting the case to a jury. Where, however, the second party raised the question of private right and also stated that if it was thought proper a jury might be appointed, and a jury was appointed who on evidence held that inasmuch as a question of title was involved, the proceeding could not be proceeded with and the Magistrate on perusing the materials placed before the jury decided that the matter was one for the Civil Court and dropped the proceedings: *Held*, that the Magistrate was justified in making the order passed by him. ASHRAFUDDIN *v.* KARIM BUKSH (1914) . . **18 C. W. N. 1148**

——— **s. 145**—

1. ——— *Refusal of process against witness—Final order without jurisdiction.* Where in a proceeding under s. 145, Criminal Procedure Code, the petitioner applied for summons against a witness, a Sub-Inspector of Police, and the Magistrate made an order that the Sub-Inspector was to appear with his diaries, but on the date on which the case was to be heard the witness did not appear, and on the petitioner again applying for summons against him the Magistrate rejected the application remarking that the application was vexatious and ultimately passed the final order under s. 145, Criminal Procedure Code: *Held*, that the order under s. 145, Criminal Procedure Code, was made without jurisdiction. GAIJUDDI HOWLADAR *v.* AINUDDI HOWLADAR (1913) . . . . **18 C. W. N. 94**

2. ——— *Non-examination of witness on either side—Final order on documentary evidence dating back to ten years previous to date of proceeding—Magistrate's duty under cl. (4)—Jurisdiction.* In a proceeding under s. 145, Criminal Procedure Code, no witness was examined on either side, but the Magistrate decided the case on the documents filed before him, the latest of those documents dating back to about ten years before the date of the proceeding. It appeared that one of the parties was present in Court but was not examined. *Held*, that the Magistrate was bound to take such further evidence as became necessary after a consideration of the documents, and the final order was without jurisdiction. Cl. (*4*) of s. 145 clearly provides that the Magistrate shall not exercise his jurisdiction under the section unless and until he has sufficient evidence before him. JUTHAN SINGH *v.* RAM NARAIN SINGH (1914) **18 C. W. N. 700**

——— **ss. 145 and 435**—*Revision—Jurisdiction—Powers of High Court. Held*, that the High Court has no power to interfere in revision with an order passed by a Magistrate under s. 145 of the Code of Criminal Procedure. *Jhingai Singh* v. *Ram Partab, I. L. R. 31 All. 150*, and *Maharaj Tewari* v. *Har Charan Rai, I. L. R. 26 All. 144*, followed. SAYEDA KHATUN *v.* LAL SINGH (1914) **I. L. R. 36 All. 233**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **ss. 145, 435, 526**—*Proceeding under s. 145, s. 526 if applies to.* A party to a proceeding under s. 145, Criminal Procedure Code, is not entitled to an adjournment of the case under sub-s. (*8*) of s. 526, Criminal Procedure Code. LAKHAN CHANDRA ROY *v.* FAKUB MANDAL (1913) **18 C. W. N. 393**

——— **s. 180**—*Indian Penal Code (Act XLV of 1860), s. 411—Theft within British territory—Retention of stolen articles outside British territory—British Courts, if have jurisdiction to try accused for such retention of stolen articles.* The accused was found in possession of stolen articles at a place outside British territory. The theft of the articles took place within British territory. The accused was placed on his trial before the Court in British territory having jurisdiction over the place where the theft took place. *Held*, that the British Courts had no jurisdiction to try the accused for an offence under s. 411, Indian Penal Code, committed at a place beyond British territory with regard to the stolen properties. MOHESHWARI PROSHAD SINGH *v.* THE KING-EMPEROR (1914) . . . . **18 C. W. N. 1178**

——— **s. 185**—

See JURISDICTION. **I. L. R. 41 Calc. 305**

——— **ss. 190** (*1*), **202, 203**—

See COMPLAINT. **I. L. R. 41 Calc. 1013**

——— **s. 190, cl.** (*c*)—*Omission of one Magistrate to take cognizance on suspicion, effect of, on subsequent proceedings.* WOODROFFE, J. (BEACHCROFT, J., concurring). Where the Police searched a hut on suspicion and incriminating evidence was found and after the search was over the Additional District Magistrate came to the spot and saw what had been found and a search list was prepared which the Additional District Magistrate signed and the accused were subsequently placed before another Magistrate who held an enquiry and committed the accused to the Court of Sessions for trial: *Held*, that the fact that the Additional District Magistrate did not take cognizance of the case at once did not render the subsequent proceedings before another Magistrate bad, nor could such subsequent proceedings be held to be prejudicial to the accused. That it was not the duty of the Additional District Magistrate to take cognizance of the case on the basis of what he found at the spot. RAMESH CHANDRA BANERJEE *v.* EMPEROR (1913) . . . . **18 C. W. N. 498**
I. L. R. 41 Calc. 350

——— **s. 192**—*Transfer—Case transferred by District Magistrate to the Court of a Sub-divisional Magistrate—Further transfer by Sub-divisional Magistrate ultra vires. Held*, that when a District Magistrate has referred a case for trial to a Sub-divisional Magistrate the latter has no power to transfer it to any other Magistrate subordinate to him. BASHIR HUSAIN *v.* ALI HUSAIN, (1913) . . **I. L. R. 36 All. 166**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 195—

See APPEAL TO PRIVY COUNCIL.
I. L. R. 41 Calc. 734

1. ——— *Sanction to prosecute—Appeal.* *Held*, that when sanction to prosecute has been granted or refused by a Court under the provisions of s. 195 of the Code of Criminal Procedure, only one appeal from such order will lie under that section. *Kanhai Lal* v. *Chhadammi Lal, I. L. R. 31 All. 48*, followed. *Muthuswami Mudali* v. *Veeni Chetti, I. L. R. 30 Mad. 382*, referred to. MATA PRASAD *v.* BARAN BARHAI (1914) **I. L. R. 36 All. 469**

2. ——— *Sanction for perjury, not desirable in public interests.* In granting sanction to prosecute for perjury, Courts should not merely see whether there is a good prospect of conviction, but should also consider whether the circumstances are such as to render prosecution desirable in the public interests. Where the petitioner, a girl of fifteen, in a statement before a Magistrate under s. 164, Criminal Procedure Code, said that her mother and one Bushayya used to talk and fight with each other and as a witness before another Magistrate stated that they never quarrelled with each other: *Held*, that a prosecution for perjury was not desirable. NATTAVA PARANKUSAM, *Re* (1914) . **I. L. R. 37 Mad. 564**

3. ——— *Oaths Act (X of 1873), s. 13—Omission to record deposition as on solemn oath or affirmation—Presidency Court of Small Causes, enquiry by Registrar, as to proper service of summons, if judicial proceedings—Sanction to prosecute, for false personation in service of summons.* Before the Registrar of the Presidency Court of Small Causes at Calcutta whose duty it is to enquire into the proper service of summons and to take evidence in this behalf, it transpired that the petitioner in this case by false representation had returned the summons as properly served and the Public Prosecutor at the instance of the Chief Judge made an application for sanction to prosecute the petitioner under s. 205 of the Indian Penal Code, which was granted by the said Registrar under s. 195 of the Criminal Procedure Code and upon a rule being obtained to question the propriety of the sanction: *Held*, that the proceedings before the Registrar were judicial proceedings and he was a judicial officer, that the sanction given by him to prosecute was properly given and the fact that it was not stated in the depositions recorded by the Registrar that they were taken on solemn oath or affirmation was a matter covered by s. 13 of the Oaths Act. *Queen* v. *Sewa Bhogta, 14 B. L. R. 294*, and *Queen-Empress* v. *Shava, I. L. R. 16 Bom. 319*, referred to. BALCHAND *v.* TARAK NATH SADHU (1914) . . . . **18 C. W. N. 1323**

——— s. 195 (1) (a)—

See SANCTION FOR PROSECUTION.
I. L. R. 41 Calc. 14

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 195—*concld.*

——— s. 195 (1) (c)—*Sanction to prosecute—Insolvency Proceedings.* Where alleged forged documents were filed in the Insolvency Court: *Held*, that the sanction of the Insolvency Court to prosecute for offences relating to the making and using of the said documents is necessary although the offence of forgery was complete before the commencement of the Insolvency Proceedings. Where the documents were produced before the Official Assignee: *Held*, that the sanction of the Court and not of the Official Assignee was necessary. The Official Assignee does not become a civil Court merely because he has a wide discretion in deciding on claims of persons alleging themselves to be creditors of the insolvent, or because persons aggrieved by decisions of his can appeal to the Court from those decisions. BEARDSELL AND CO. *v.* ABDUL GUNNI SAHIB (1914) . . . **I. L. R. 37 Mad. 107**

——— s. 195, cls. (b), (c)—*Income-Tax Collector—Revenue Court—Sanction to prosecute—Indian Penal Code (Act XLV of 1860), ss. 193, 196, 199, 471—Offences committed before the Income-Tax Collector.* An Income-Tax Collector is a Revenue Court within the meaning of that term as used in clauses (*b*) and (*c*) of s. 195 of the Criminal Procedure Code, 1898. PUNAMCHAND MANEKLAL, *In re* (1914) . . **I. L. R. 38 Bom. 642**

——— ss. 195 and 439—*Sanction to prosecute—Revision—Powers of High Court.* S. 195 of the Code of Criminal Procedure does not enable the High Court to reconsider an order of a Sessions Judge, refusing under clause (*6*) to grant a sanction to prosecute which was refused by the Magistrate, and although the revisional jurisdiction of the High Court under s. 437 of the Code of Criminal Procedure can always be exercised in order to prevent a gross and palpable failure of justice, it should not be exercised in such a way as to practically give a right of appeal in cases where such right is definitely excluded by the Code. AHSAN-ULLAH KHAN *v.* MANSUKH RAM (1914) . **I. L. R. 36 All. 403**

——— s. 196—

See CONTEMPT OF COURT.
I. L. R. 41 Calc. 173

——— s. 200—*Complaint by a purdanashin lady signed and presented by agent holding general power to present complaints—Absence of special power—Duty of Magistrate to satisfy himself if complaint really by person by whom it purports to be—Magistrate bound to examine complainant before issuing process—Complaint not presented in person, proper course for Magistrate on receipt of—Words "at once," effect of, in s. 200—S. 198, compliance with the requirments of—S. 503, scope of—Examination of complainant on commission—Indian Penal Code (Act XLV of 1860), s. 500—Defamation.* A complaint was filed before the Chief Presidency Magistrate under s. 500, Indian Penal Code, purporting to be made by a purdanashin lady and signed by a person in whose

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 200**—*concld.*

favour there was a general power-of-attorney authorising the presentation of criminal complaints, but no power-of-attorney authorising the presentation of the specific complaint. The Chief Presidency Magistrate issued process against the accused and transferred the case to another Magistrate. *Held* (on a reference under s. 432, Criminal Procedure Code), that the Chief Presidency Magistrate was wrong in issuing process against the accused. It is perfectly well-settled that a process cannot be issued against an accused person either by the Magistrate first taking cognizance of an offence or by the Magistrate to whom the case is transferred under the proviso to s. 200, Criminal Procedure Code, unless and until the Magistrate issuing process has first examined the complainant. And this is more necessary in the case of a purdanashin lady than in other cases to enable the Magistrate to satisfy himself that the complaint is really her own action. That the Magistrate should be very loth to take cognizance of any complaint which is not presented in person. The words "at once" in s. 200 of the Code clearly indicate that ordinarily a complaint must be presented in person and a complaint should not be accepted which is not signed by the complainant and is not preferred by a person duly authorised to prefer that specific complaint. That whether the requirements of s. 198, Criminal Procedure Code, were satisfied in the present case depended upon whether or not the complaint was the complaint of the lady. [The High Court quashed the proceedings, giving liberty to the lady to file a fresh complaint and directed her examination, if fresh complaint was made, by a commission issued to a Magistrate.] *Held*, that the terms of s. 503, Criminal Procedure Code, are very wide. They refer not only to an enquiry and a trial, but to any other proceedings. The section authorises the examination of any witness, and the complainant is a witness. ABHOYESWARI DEVI *v.* KISHORI MOHAN BANERJEE (1914).

18 C. W. N. 1020

——— **s. 202**—

See MALICIOUS PROSECUTION.

I. L. R. 37 Mad. 181

———*Local enquiry by pleader—Consideration of new ground at hearing of rule.* A Magistrate has no jurisdiction to order a local enquiry by a pleader in the nature of a commission in a civil case. Case in which the High Court considered a ground other than those on which the rule was issued. MOHAR KHAN *v.* GAYZUDDIN SHEIKH (1913) . . . . **18 C. W. N. 399**

——— **ss. 202, 203, 476**—*Order of Magistrate taking cognizance making over case to another Magistrate for disposal after a local enquiry, if legal —Dismissal of complaint—Order for prosecution.* Where the petitioner laid a complaint before the Magistrate against a police-officer charging him with various offences of wrongful confinement, extortion, mischief, etc., and the Magistrate who took cognizance of the case made it over to another Magistrate with a direction that the latter would make a local enquiry and then dispose of the case, and the Magistrate to whom the case was so made over made a local enquiry and after examining witnesses dismissed the complaint under s. 203, Criminal Procedure Code, and made an order under s. 476 for the prosecution of the petitioner under s. 211, Indian Penal Code: *Held*, that the order of the Magistrate before whom the complaint was laid was bad in directing the latter Magistrate to hold a local enquiry inasmuch as the Code of Criminal Procedure does not make any provision for such a course by a Magistrate to whom a case is made over for disposal. On a consideration of the circumstances of the case the High Court set aside the orders under ss. 203, 476, Criminal Procedure Code, and directed a further enquiry into the case. IMAMUDDIN *v.* DEBENDRA NATH (1913) . . . **18 C. W. N. 95**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*concld.*

——— **s. 202**—*concld.*

——— **s. 203**—*Complaint—Dismissal of complaint—Second complaint in pari materiâ—"Same Court"—Jurisdiction.* Where the question is as to the competence of a Magistrate to entertain a second complaint *in pari materiâ* with a former complaint which has been dismissed under s. 203 of the Code of Criminal Procedure, it is not necessary that both complaints should be before the same person, but before the presiding officer of the same Court. *King-Emperor* v. *Adam Khan, I. L. R. 22 All. 106*, distinguished. *King-Emperor* v. *Umedan, All. Weekly Notes (1905), 86*, and *Emperor* v. *Keymer, I. L. R. 36 All. 53*, referred to. RAM BHAROS *v.* BABAN (1914)

I. L. R. 36 All. 129

——— **s. 213**—*Committal of a case to the Court of Session—Reasons for committal to be given where the case can be tried by the Magistrate—Indian Registration Act (XVI of 1908), s. 83, cl. (2)—Irregularity—Illegality.* Where a Magistrate, who could have tried the case himself under cl. (2) of s. 83 of the Indian Registration Act (XVI of 1908), committed it to the Court of Session without giving any reasons for committal: *Held*, that the reasons for committal must include not merely reasons for not discharging the accused, but reasons for sending him to the Court of Session, as the trial could be had either by the Magistrate himself or by the Court of Session; and that the omission to give the reasons was an illegality. EMPEROR *v.* NANJI SAMAL (1913)

I. L. R. 38 Bom. 114

——— **ss. 222 (2), 233, 234**—

See CHARGE . **I. L. R. 41 Calc. 722**

——— **s. 233**—

See EXCISE . **I. L. R. 41 Calc. 694**

——— **ss. 233, 234, 537**—

See CHARGE . **I. L. R. 41 Calc. 66**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **ss. 236, 237**—

See COCAINE . **I. L. R. 41 Calc. 537**

——— *Indian Penal Code (Act XLV of 1860), ss. 147, 323—s. 237, Criminal Procedure Code, when applies—Conviction of rioting without any charge under s. 423, Indian Penal Code.—Conviction under s. 323, Indian Penal Code, by Appellate Court after setting aside conviction of rioting, legality of.* The petitioners were convicted by the Magistrate, under s. 147, Indian Penal Code. On appeal, the Sessions Judge set aside the conviction and sentence under s. 147, Indian Penal Code, and convicted the petitioners under s. 323, Indian Penal Code. No charge had been framed against the petitioners under s. 323, Indian Penal Code : *Held*, that s. 237 has to be read with s. 236. If the facts of the case do not fall under s. 236, s. 237 has got no application. There was no charge framed against the petitioners for an offence of causing hurt, and they had therefore no opportunity to defend themselves on this charge and the conviction and sentence must be set aside. GENU MANJHI *v.* THE KING-EMPEROR (1914)

18 C. W. N. 1276

——— **s. 237.**—*Conviction of rioting with common object of assault—Acquittal by Appellate Court on charge of rioting and conviction of assault, if proper—Necessity of finding against individual accused on charge of assault.* The petitioners were charged under s. 147, Indian Penal Code, the common object of the alleged unlawful assembly as stated in the charge being to assault the police. No charge under s. 353 or s. 323 was framed. The Magistrate convicted the petitioners under s. 147, Indian Penal Code. The Sessions Judge in appeal acquitted the petitioners of the offence of rioting and convicted them under s. 353, Indian Penal Code, in respect of the assault committed upon the several police officers. The Sessions Judge did not find which police officer was assaulted by which petitioner : *Held*, that the Sessions Judge was wrong in convicting the petitioners of an offence under s. 353, Indian Penal Code, the petitioners not having been called upon to answer any such charge. That in the view taken by the Sessions Judge of the case, a finding as to which police officer was assaulted by which petitioner was essential. HAR NARAN SARDAR *v.* THE EMPEROR (1914) . . . . . **18 C. W. N. 1274**

——— **ss. 244 and 540**—*Right of accused to summon witnesses—Second application by accused to Magistrate not seised of the case—Procedure—Affidavit.* When an accused person has been called upon to make his defence and has applied for and obtained the summoning of witnesses on his behalf, his only means of procuring the summoning of further witnesses is to ask the Court to take action under s. 540 of the Code of Criminal Procedure. The accused has no right to put in a second application *simpliciter* for the summoning of more witnesses, nor has the Court any power to grant such an application, more particularly when such Court is a Magistrate not seised of the case, to whom the application is made in the absence of the trying Magistrate. Observations on the contents, drafting and attestation of affidavits. EMPEROR *v.* MANGAL (1913)

I. L. R. 36 All. 13

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **ss. 244**—*concld.*

——— **s. 247**—

1. ——— *Summons case, hearing of, when concludes—Non-appearance of complainant on date fixed for argument and consequent acquittal of accused, if proper.* Where in a summons case, after the examination of the witnesses for the prosecution and the defence, the Magistrate adjourned the case for argument for the purpose of the documentary and oral evidence being explained to him, and on that adjourned date the complainant did not appear and the accused was acquitted under s. 247, Criminal Procedure Code : *Held*, that although the Code of Criminal Procedure makes no provision for argument in a case governed by Chap. XX of the Code, the hearing of the case did not end with the examination of the witnesses for the parties and s. 247 had application to the circumstances of the case. RAM JIWAN RAI *v.* ABILAKH BARAI (1913)

18 C. W. N. 584

2. ——— *Order of acquittal on account of complainant's absence, passed on a date not fixed for hearing of case, effect of.* A case was called on by mistake on a date not fixed for hearing, and the Magistrate recorded an order of acquittal under s. 247, Criminal Procedure Code, on account of the absence of the complainant. On the date fixed for hearing the mistake was discovered and the Magistrate ignored the order previously passed by him under s. 247, Criminal Procedure Code, and went on with the case which ended in a conviction : *Held*, that an order passed on a date which was not fixed for the hearing of the case and on which date the complainant was necessarily absent is no order at all, and the trying Magistrate had jurisdiction to ignore it and go on with the case and come to the finding which he did. *High Court Proceedings, No. 1793, 2 Weir 307*, followed. *Suresh Chandra* v. *Banku, 2 C. L. J. 622*, distinguished. ACHAMBIT MONDAL *v.* MOHATAB SINGH (1914) . . **18 C. W. N. 1180**

3. ——— *Complaint by servant on behalf of master—Acquittal under s. 247 on death of such complainant—Complaint of same offence by another servant—Previous acquittal, if bar to Magistrate's taking cognisance of second complaint—Penal Code (Act XLV of 1860), s. 426—Maiming an animal.* A servant on behalf of his master filed a complaint that an elephant belonging to his master had been maimed by the accused. The Magistrate receiving the complaint issued process under s. 426, of the Penal Code. On the date fixed for the disposal of the case, finding that the complainant was dead, the Magistrate acquitted the accused under s. 247, Criminal

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 247**—*concld.*

Procedure Code. Thereupon another servant (the petitioner) complained to the Sub-divisional Magistrate of the same offence of maiming his master's elephant, but the Sub-divisional Magistrate dismissed the complaint under section 203, Criminal Procedure Code, on the ground that the previous acquittal was a bar to his taking cognizance of it : *Held*, that the previous acquittal was wholly without jurisdiction and was no bar to the Magistrate's taking cognizance of the second complaint. MADHO CHOWDHURY *v.* TURAB MIAN (1914)

18 C. W. N. 1211

——— **s. 250**—

1. ——— *Compensation to accused—Final order if should be contained in order of discharge or acquittal—Proviso, meaning of—Imprisonment in default of payment of fine, when to be ordered.* Where in discharging the accused under s. 253, Criminal Procedure Code, the Magistrate in his order of discharge declared the case to be vexatious and directed the complainant under s. 250, Criminal Procedure Code, to pay compensation to the accused subject to any cause being shown by him, and no cause being shown by the complainant the Magistrate the day after made his previous order absolute and further directed the complainant to suffer simple imprisonment for 30 days in default of payment of the compensation: *Held*, that the Magistrate's order directing the payment of compensation was in strict compliance with s. 250, Criminal Procedure Code. It is sufficient that the Magistrate fixed the compensation in his order of discharge. The proviso to s. 250 clearly contemplates that the direction in the first paragraph of the section shall be considered as in the nature of a rule and that that rule shall not be made absolute until the complainant has shown cause. *Haru Tanti* v. *Satish Roy, I. L. R. 38 Calc. 302*, distinguished. So far as the sentence of imprisonment in default of payment was concerned, the High Court *held* that there was an obvious error and ordered it to be amended in terms that the compensation shall be recovered as if it were a fine and in the event of its not being so recovered there shall be simple imprisonment. LALIT MOHAN SINGHA *v.* KUNJA BEHARY GHOSH (1913)

18 C. W. N. 702

2. ——— *Compensation, order for payment of, by complainant—Opportunity to show cause* The Magistrate after acquitting the accused made the following order:—"Accused acquitted, complainant to pay compensation to each of the accused under s. 250, Criminal Procedure Code, and show cause why he should not pay. Complainant is absent. His brother verbally shows cause which is insufficient; order made absolute." *Held*, that the complainant was in fact given no opportunity of showing cause and the order should be set aside. SUBANS SINGH *v.* MOHABIR PROSHAD SINGH (1914)

18 C. W. N. 1277

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **ss. 250, 537**—*Frivolous or vexatious complaint—Compensation—Procedure—Irregularity.* A Magistrate, after recording the evidence for the prosecution and the statement of the accused, came to the conclusion that the complaint was unfounded and discharged the accused, and in the same order called upon the complainant to show cause, under s. 250 of the Code of Criminal Procedure, why he should not pay compensation to the accused. Four days later, after hearing the complainant, the Magistrate passed an order directing him to pay compensation. *Held*, that the proceedings, though not strictly in accordance with s. 250 of the Code, were not so far at variance with its provisions as to fall outside the purview of section 537. *Jugal Kishore* v. *Abdul Karim, All. Weekly Notes, (1905) 214*, and *Emperor* v. *Punamchand Hirachand, 8 Bom. L. R. 847*, followed. *In re Safdar Husain, I. L. R. 25 All. 315*, not followed. GHURBIN KOERI *v.* KHALIL KHAN (1914)

I. L. R. 36 All. 132

——— **ss. 256, 258, 417**—*Penal Code (Act XLV of 1860), s. 406—Appeal by Local Government against acquittal—Powers and duties of the High Court—Order of acquittal passed after cross-examination of prosecution witnesses subsequent to framing of charge.* The accused was placed on his trial for having committed criminal breach of trust in respect of some bales of jute. The accused admitted his liability. The trying Magistrate framed a charge under s. 406, Indian Penal Code, and after cross-examination of the witnesses for the prosecution acquitted the accused under s. 258, Criminal Procedure Code, holding that the case was one of civil dispute. *Held* (on an appeal by the Local Government under s. 417, Criminal Procedure Code), that in an appeal from an acquittal the High Court could not interfere unless the judgment of the Court below was wrong and perverse or without jurisdiction and based upon obvious errors in procedure, and there being nothing of the kind in the case, the High Court should uphold the decision of the Magistrate, even though wrong, because it would be based at the most on a doubtful weighing of facts and not on any irregularity or negligence or other matter owing to the jurisdiction or the regularity of the trial. That the order of acquittal having been passed subsequent to the framing of the charge and after the cross-examination of the witnesses for the prosecution, was not irregular or without jurisdiction. DEPUTY LEGAL REMEMBRANCER OF BENGAL *v.* AMULYA DWAN (1913)

18 C. W. N. 666

——— **ss. 263, 342**—

See SUMMARY TRIAL

I. L. R. 41 Calc. 743

——— **ss. 271, 272, 308, 403**—

See AUTREFOIS ACQUIT.

I. L. R. 41 Calc. 1072

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 282**—*Jury—Juror discharged during trial and fresh juror substituted—Trial not recommenced—Invalidity of proceedings.* On trial by a jury, after two witnesses had been examined, one of the jurors was discovered to be deaf and was discharged and another juror sworn in his place. The trial, however, was not commenced afresh, but the evidence given by the two witnesses was read over to and admitted by them. *Held*, that this procedure was inadmissible and the trial so held invalid. EMPEROR *v.* NARAIN (1914)
I. L. R. 36 All. 481

——— **s. 307**—

See CRIMINAL TRESPASS.
I. L. R. 41 Calc. 662

1. ——— *Disagreement between Judge and jury—Reference to High Court—Sub-s. (3)—Opinion of the jury if equivalent to verdict—Verdict, grounds of, when desirable to ascertain.* The expression "opinion of the Sessions Judge and the jury" in sub-s. (*3*) of s. 307 of the Criminal Procedure Code, is equivalent to "opinion of the Sessions Judge and verdict of the jury" and it is not necessary for a Sessions Judge before making a reference to the High Court to ascertain the opinion of the jurors apart from their verdict. *Emperor* v. *Chellan, I. L. R. 29 Mad. 91*, not followed. After the jury have returned their verdict and after the Judge has stated that he will not accept the verdict, it may be desirable to ascertain the grounds of their verdict, but there is no express provision in the Code for ascertaining the opinion of the jury. EMPEROR *v.* TARAPADA NASKAR (1913)
18 C. W. N. 615

2. ——— *Jurisdiction of High Court to convict of offence under s. 326, Penal Code (Act XLV of 1860).* The High Court is empowered on a reference under s. 307, Criminal Procedure Code, to convict the accused of an offence under s. 326 of the Penal Code. *Sir V.* BHASHYAM AYYANGAR, *J.*, in *Pattikadan Ummaru* v. *Emperor, I. L. R. 26 Mad. 243*, followed. BENSON, *J.*, in *Pattikadan Ummaru* v. *Emperor, I. L. R. 26 Mad. 243*, disssented from. MUTYALU, *Re* (1914)
I. L. R. 37 Mad. 236

——— **s. 345.**—*Compromise effected out of Court by parties, pending hearing of rule issued by High Court, if can be given effect to under s. 345, Criminal Procedure Code.* The petitioner was the complainant in a case and the accused in the counter-case. The petitioner's complaint was dismissed by the Magistrate and in the other case he was convicted under s. 352 of the Penal Code. He moved the High Court and obtained a Rule in each case, in one for a further enquiry into his complaint and in the other for a reduction of the sentence passed on him. Pending the hearing of the Rules both cases were compromised by the parties out of Court. *Held*, that at the hearing of the Rules, the parties had no *locus standi* to ask the Court to treat the compromise as one coming under s. 345, Criminal Procedure Code.

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 345**—*concld.*

ADHAR CHANDRA DEY *v.* SUBODH CHANDRA GHOSH (1914) . . . . **18 C. W. N. 1212**

——— **s. 349**—*Trying Magistrate sending up a case to the Sub-divisional Magistrate on the ground that he cannot pass adequate sentence—Sub-divisional Magistrate sending up the case to another Magistrate—Committal of the case by such Magistrate to Court of Session—Commitment not valid—Practice and Procedure.* A Magistrate of the Second Class trying a case sent up the case to the Sub-divisional Magistrate on the ground that he could not pass an adequate sentence. The latter transferred the case to a Magistrate of the First Class who committed it to the Court of Session. A question having arisen if the commitment was legal: *Held*, quashing the commitment, that under section 349 of the Criminal Procedure Code (Act V of 1898) it was the Sub-divisional Magistrate alone who was competent to deal with the case. EMPEROR *v.* VINAYAK NARAYAN (1914) . . . **I. L. R. 38 Bom. 719**

——— **ss. 350 and 528**—*Transfer—Jurisdiction—Power of Court to which a case is transferred to act on evidence taken by the Court from which it came.* S. 350 of the Code of Criminal Procedure is not limited to cases in which Magistrates succeed each other in offices but applies also to all cases transferred from the file of one Magistrate to that of another under s. 528 of the Code. An order of commitment to the Court of Session passed by a Magistrate on evidence recorded by a bench of Magistrates from whose Court it was transferred, is not an illegal order. *Queen-Empress* v. *Bashir Khan, I. L. R. 14 All. 346*, distinguished. *Emperor* v. *Angnu, All. Weekly Notes, (1889) 136*, not followed. *Mohesh Chandra Saha* v. *Emperor, I. L. R. 35 Calc. 457*, and *Palaniandy Goundan* v. *Emperor, I. L. R. 32 Mad. 218*, followed. EMPEROR *v.* NANHUA (1914)
I. L. R. 36 All. 315

——— **s. 360, sub-s. (*1*) ; s. 476**—*Handing over record of deposition to witness for being read by him if sufficient compliance with law—Such deposition if admissible and assignment of perjury if can be made thereon—Examination of witnesses in enquiry under s. 476, Criminal Procedure Code—Duty of Magistrate to make a record of statements.* An order under s. 476, Criminal Procedure Code, was made against the petitioner directing his prosecution under s. 193 of the Penal Code, with reference to a deposition given by him as a witness at a criminal trial. It appeared that after the deposition had been recorded, the record was handed over to the petitioner who proceeded to read it over himself. The Magistrate held a preliminary enquiry under s. 476, Criminal Procedure Code, before making the order for prosecution, and examined witnesses in the course of that enquiry, but made no record of their statements: *Held*, that the provisions of s. 360, sub-s. (*1*), Criminal Procedure Code, were not

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 360**—*concld.*

sufficiently complied with inasmuch as that sub-section requires that the evidence should be read over in the presence, that is, in the hearing, of the accused, in order that the accused should have an opportunity of correcting any mistake in it. That the deposition was inadmissible and the order for prosecution must be set aside, That the Code of Criminal Procedure does not contain any provision with regard to the manner in which the evidence in an enquiry under s. 476, Criminal Procedure Code, should be recorded; but for future reference the Magistrate should have made a summary of the statements of the witnesses examined. KING-EMPEROR *v.* JOGENDRO NATH GHOSH (1914) . . **18 C. W. N. 1242**

——— **ss. 367 and 421**—*Appeal—Appeal summarily dismissed—How far Court bound to record reasons for dismissal.* A Court of criminal appeal is not bound, when dismissing an appeal summarily under s. 421 of the Code of Criminal Procedure, to write a judgment as defined in s. 367 of the Code. It is, however, advisable that it should give reasons for rejecting the appeal in view of the possibility of its order being challenged by an application for revision. *Queen-Empress* v. *Warubai, I. L. R. 20 Bom. 540*, followed. *Rash Behari Das* v. *Balgopal Singh, I. L. R. 21 Calc. 92, Queen-Empress* v. *Narain, I. L. R. 8 All. 514, Queen-Empress Nannhu, I. L. R. 17 All. 241*, and *Queen-Empress* v. *Pandeh Bhat, I. L. R. 19 All. 506*, referred to. EMPEROR *v.* KUNDAN (1914) . . **I. L. R. 36 All. 496**

——— **ss. 403, 423, 439**—*Previous acquittal on a charge of causing simple hurt—Subsequent death of person injured—Commitment of the persons acquitted of the minor offence under s. 304 of the Penal Code—Revision.* *S* and *R* were charged with causing simple hurt to *K*. The case was compounded and both the accused were acquitted. *K*, later on, died of the injury caused by *S* and *R*. The Magistrate, thereupon, sent up *R* for trial before the Sessions under s. 304, and discharged *S* as he found that the injury caused by him did not in any way contribute to *K*'s death. The Sessions Judge directed the Magistrate to commit *S* also, and he was committed accordingly. *Held*, that there was no legal bar to the trial of *S* under s. 304 of the Indian Penal Code, and to his conviction under that section if the evidence enabled the Court to apply either s. 34 or 114 of the Penal Code to the case. A commitment can only be set aside on a point of law and as no such point arose in this case, High Court did not interfere. EMPEROR *v.* SAILANI (1913) . . . **I. L. R. 36 All. 4**

——— **s. 417**—

See STATUTE 24 & 25 VICT., C. 104, ss. 1 AND 2 . . **I. L. R. 36 All. 168**

——— **ss. 421-423**—

See APPEAL . **I. L. R. 41 Calc. 406**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 422**—*Order admitting appeal on ground of sentence only, if legal.* The appellant who was found guilty under ss. 376-511 of the Penal Code, by the unanimous verdict of the jury and sentenced to rigorous imprisonment for five years, preferred an appeal to the High Court which was admitted by a Bench of the High Court for consideration of the sentence only. On the appeal coming on for hearing before another Bench, a direction was made enlarging the scope of the order of admission. The appeal subsequently came on for hearing before a third Bench and was disposed of on a consideration of the grounds taken by the appellant besides the question of sentence. An appeal admitted under s. 422, Criminal Procedure Code, is the whole appeal and consequently all the grounds taken in the petition of appeal are open for consideration at the final hearing, and the appellant cannot be restricted to any selected ground out of those specified in his petition and a restrictive order for admission is clearly not contemplated by s. 422 and must be deemed *ultra vires*. NAFAR SHEIKH *v.* EMPEROR (1913) **18 C. W. N. 147**
I. L. R. 41 Calc. 406

——— **s. 423**—*Sentence—Alteration of sentence whether amounting to an enhancement or not.* A Magistrate on a conviction under s. 379 of the Indian Penal Code sentenced the accused to one month's rigorous imprisonment and a fine of Rs. 5 each and in case of a default in payment of the fine, to one week's further imprisonment. The District Magistrate on appeal by the accused altered the sentence to one of three days' imprisonment and a fine of Rs. 100, and in default of payment of fine, to a further imprisonment of one month. *Held*, that in the absence of any evidence that the accused were unable to pay the fine or regarded the sentence passed on appeal as more severe than the original sentence, it could not be said that the sentence had been enhanced. *Queen-Empress* v. *Chagan Jagannath, I. L. R. 23 Bom. 439*, and *Bakthavatsalu Naidu* v. *Emperor, I. L. R. 30 Mad. 103*, doubted. *Rakhal Raja* v. *Khirode Pershad Dutt, I. L. R. 27 Calc. 175*, approved. EMPEROR *v.* MEHAR CHAND (1914) . **I. L. R. 36 All. 485**

——— **ss. 423 and 439**—*High Court, power of, to alter finding of acquittal into conviction and enhance sentences in Revision—Penal Code (Act XLV of 1860), s. 300, explained.* S. 423, clause (*b*), Criminal Procedure Code, 1898, gives power to the High Court when hearing an appeal against a conviction to alter the finding and s. 439 gives power to enhance the sentence so as to make it appropriate to the altered finding. S. 439, sub-s. (*4*), which enacts that "nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction" must be construed as referring to cases where the trial has ended in a complete acquittal; any other construction would be inconsistent with the power to "alter the finding" given to the Court as a Court of Revision by virtue of its power to

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 423**—*concld.*

exercise the power conferred on a Court of Appeal by section 423, clause (*b*). In this view the High Court, having in revision altered a finding of rioting into one of murder, enhanced the sentences from five years' rigorous imprisonment to transportation for life. In the course of a riot the accused attacked and killed a man with dangerous weapons: *Held*, that the acts of the accused having caused the death of the man and there being nothing to suggest that they were not sufficient to cause death as their ordinary and natural result in the absence of proof of circumstances sufficient to give the accused the benefit of any of the exceptions to s. 300 of the Penal Code, they must be taken to have intended to kill the man and are guilty of murder. BALI REDDI, *Re* . . . **I. L. R. 37 Mad. 119**

——— **s. 437**—*Accused once tried and discharged—Fresh inquiry into the same charge on a second complaint—Jurisdiction. Held*, that it is competent to a Magistrate who has tried and discharged an accused person on particular charges to again inquire into the same charges on a second complaint. *Queen-Empress* v. *Umedan*, *All. Weekly Notes*, (*1895*) *86*, followed. EMPEROR *v.* KEYMER (1913) . . . . **I. L. R. 36 All. 53**

——— **s. 438**—*Enhancement of sentence—Reference made by District Magistrate after Sessions Judge has declined to interfere—High Court—Practice. Quære:* Whether a District Magistrate is as a matter of law entitled to make a reference to the High Court under s. 438 of the Code of Criminal Procedure in a matter in which the Sessions Judge has been asked to send a case up to the High Court for enhancement of sentence and has refused to do so. But if he is so entitled, it is extremely inconvenient that a District Magistrate should do so, and the High Court would not take action upon such a reference without special reason. *Queen-Empress* v. *Zor Singh*, *I. L. R. 10 All. 146*, *Emperor* v. *Jamna Bai*, *I. L. R. 28 All. 91*, and *Emperor* v. *Krisnaji Shamrao*, *6 Bom. L. R. 1099*, referred to. EMPEROR *v.* GANGA (1914) **I. L. R. 36 All. 378**

——— **s. 439**—*Revision of sentence on consideration of fresh facts—Penal Code (Act XLV of 1860), s. 147—Rioting over disputed possession of chur—Finding of Settlement Officer pronounced after issue of Rule considered by High Court in revising sentence.* In a case of rioting arising out of a dispute relating to the possession of a *chur* between the zamindar and the talukdar in which both the lower Courts found in favour of the complainant on the question of possession, but the Assistant Settlement Officer, after the judgment of the Sessions Judge in appeal was pronounced and after a Rule was issued by the High Court, found in connection with the preparation of record-of-rights that the culturable area in the *chur* was in the possession of the zamindar whose men the petitioners were, the High Court

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 439**—*concld.*

for the purpose of revising the sentence considered the judgment of the Assistant Settlement Officer and reduced the sentence. ARAJ SARKAR *v.* EMPEROR (1913) . . **18 C. W. N. 646**

——— **ss. 439, 258**—*Order of acquittal set aside by High Court in revision on merits, on the application of the complainant.* Where the trying Magistrate in his judgment by which he acquitted the accused while laying great stress on all consideration that might affect the credibility of the witnesses for the prosecution, omitted to consider what might be advanced in their favour and also failed to appreciate the corroborative value of an important witness for the prosecution, the High Court, an the application of the complainant, set aside the order of acquittal on the merits and directed a re-trial by a new Magistrate SHAIKH BAGU *v.* RAIKA SINGH (1914) **18 C. W. N. 1244**

——— **ss. 439, 517, 520**—*Restoration of moveable property—Charge of theft—Malkhana register, order passed in, making over property to complainant—Acquittal by High Court—Subsequent order of Magistrate refusing to revise order in Malkhana register—Revision by High Court.* Certain properties alleged to be stolen properties, were found in the house of the petitioner who was tried and convicted of theft. These properties were in the custody of the Court and after the judgment of the Sessions Judge affirming the conviction of the petitioner, the trying Magistrate passed an order in the Malkhana register to the effect that the properties should be made over to the complainant. No order was passed on the record of the case. The petitioner moved the High Court against the conviction and sentence and was acquitted. After his acquittal by the High Court, the petitioner applied to the trying Magistrate for the restoration of the properties to him, but the Magistrate held that he could not revise his previous order in the Malkhana register. The petitioner then moved the High Court and obtained a Rule: *Held*, that the Malkhana register forms no part of any criminal case, unless it is brought on the record in a legal way and the order in complainant's favour recorded in it was not one under s. 517, Criminal Procedure Code, but the order refusing to revise that order was an order under s. 517, Criminal Procedure Code, and the High Court had jurisdiction to revise it under s. 520, as also under s. 439, Criminal Procedure Code. The intention of the Legislature in cl. (*3*) of s. 517 is that an order under s. 517 should not be carried into effect until it really becomes final either by there being no appeal within the prescribed period or by any final order by a Court of final jurisdiction. That after the accused is acquitted of theft or burglary, the proper order to make is to direct that the property found in the possession of the accused should be restored to him. The complainant in that case could go to

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 439**—*concld.*

the Civil Court, file a suit and secure an injunction. That, in the circumstances of the case, the absence of a prayer by the petitioner as to the restoration of the properties in his previous application to the High Court was no bar to his getting relief in this Rule. KEDAR BISWAS *v.* MATHURA NATH MITRA (1913) . . . . . **18 C. W. N. 959**

——— **s. 476**—*Sanction for prosecution—S. 537 (b)—Illegality or Irregularity.* Where a sanction to prosecute given under s. 476, Criminal Procedure Code (Act V of 1898), did not order the accused to be sent before the nearest First Class Magistrate but merely ordered his prosecution: *Held*, that though the sanction was irregular it was not illegal and that the irregularity was cured by s. 537 (*b*), Criminal Procedure Code. *In re Bhup Kunwar, I. L. R. 26 All. 249, 256*, dissented from. *Re* SUPPAYYA THARAGAN (1914)
I. L. R. 37 Mad. 317

——— **s. 488** (*1*)—*Maintenance—"Child," meaning of—Prostitution not a profession which the law will recognize.* The word "child" in section 488 (*1*), Criminal Procedure Code (Act V of 1898), means a person who has not attained the age of majority. The attainment of puberty cannot be taken as the age when childhood ceases. The law will not treat prostitution as a profession by which a girl might earn her livelihood and maintain herself under s. 488, Criminal Procedure Code. It is against public policy to do so. KRISHNASWAMI AYYAR *v.* CHANDRAVADANA (1914)
I. L. R. 37 Mad. 565

——— **s. 488** (*1*), (*3*), (*6*)—

See MAINTENANCE.
I. L. R. 41 Calc. 88

——— **s. 494**—

1. ——— *European British subject, rights of, regarding trial—Conviction by a Magistrate not a Justice of the Peace—Omission of Magistrate to inform accused of such rights, if vitiates trial.* Where a European British subject was placed on his trial before a Magistrate who was not a Justice of the Peace on a charge under s. 323 of the Penal Code, and the Magistrate convicted the accused without asking him whether he was a European British subject and without informing him of his rights as a European British subject under the Code of Criminal Procedure: *Held*, that the conviction and sentence should be set aside on account of the error in the procedure of the Magistrate in the trial. BALADEB MISRI *v.* A. M. CLARKE (1913) . . **18 C. W. N. 385**

2. ——— *Prosecution against one of two accused withdrawn—Such accused, if competent witness—Confession and prior statements of such accused if should be produced for cross-examination and contradiction.* The petitioner along with one *M* was placed on his trial under s. 411 of the Penal Code, but the prosecution against *M* was withdrawn, under s. 494, Criminal Procedure

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 494**—*concld.*

Code, although no formal order of discharge was recorded. *M* was thereupon examined as a witness for the prosecution. It appeared that *M* had made a confession to a Magistrate and this confession was subsequently verified by the same or another Magistrate to whom *M* made further statements. The confession and these further statements were not placed on the record and copies of these were refused to the petitioner. *Held*, that notwithstanding the omission to record a formal order of discharge *M* ceased to be on trial with the petitioner as soon as the prosecution against him was withdrawn, and that being so he became a competent witness; but for the purpose of cross-examination and, if necessary, for contradiction the prior statements of the witness should have been made accessible to the accused. SHERATI SHEIKH *v.* THE KING-EMPEROR (1914) . **18 C. W. N. 1213**

——— **s. 514** (*5*)—*Bail bond—Bail, prisoner on, committing suicide—Discharge of sureties.* When a person who has been let out on bail commits suicide, the sureties are discharged from their obligation to produce him. VIJIARAGHAVALU NAIDU, *Re* (1914) . . . **I. L. R. 37 Mad. 156**

——— **s. 517**—

1. ——— *If applies to immoveable property.* S. 517, Criminal Procedure Code, has no application to immoveable property. BISESUR SINGH *v.* KING-EMPEROR (1913)
18 C. W. N. 1146

2. ——— *Setting aside of order by High Court—Re-delivery of possession.* The petitioners were convicted under s. 426 of the Penal Code. The Magistrate directed the Police under s. 517 to deliver possession of a garden over which the petitioners were alleged to have obtained possession by means of trespass. The order under s. 517 was set aside by the High Court in revision on the application of the petitioners, but the Magistrate refused to re-deliver possession of the garden to them. *Held*, that the order of the High Court setting aside the order under s. 517, Criminal Procedure Code, carried with it the incident of restoration of the garden in question to the petitioners. The High Court directed the Magistrate to restore possession of the garden in question to the petitioners through the Police. SHEONANDAN SINGH *v.* BHOLANATH PATTAK (1913)
18 C. W. N. 1147

——— **s. 522**—

1. ——— *Propriety of order in the absence of finding as to dispossession of immoveable property.* An order under s. 522, Criminal Procedure Code, is not sustainable where there is no finding that the complainant has been dispossessed of any immoveable property. MOHAR KHAN *v.* GAYZUDDIN SHEIKH (1913)
18 C. W. N. 399

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*concld.*

——— **s. 522**—*concld.*

2. ——— *Penal Code (Act XLV of 1860), ss. 147, 349—Restoration of possession of immoveable property—Criminal force, meaning of—Rioting with the common object of causing violence to inanimate object—Applicability of s. 522.* When the accused was convicted of rioting for causing violence in the prosecution of a common object, *viz.*, by destroying the complainant's fencing and raising a new fencing on the complainant's land: *Held*, that violence having been caused in this case to the fencing only and not to any person, there was no criminal "force" as defined in s. 349 of the Penal Code, and no order directing delivery of possession could be made under s. 522, Criminal Procedure Code. SADASIB MANDAL *v.* EMPEROR (1913) .

18 C. W. N. 1150

——— **ss. 522, 145**—*Infructuous order directing restoration of immoveable property, if bar to proceeding under s. 145.* An infructuous order under s. 522, Criminal Procedure Code, which was never carried out, is no bar to the jurisdiction of the Magistrate taking proceedings under s. 145, Criminal Procedure Code, in respect of the same property. PROBHAT CHANDRA CHATTERJI *v.* PROSANNO KUMAR SEN (1914) . **18 C. W. N. 1088**

——— **s. 526**—*Transfer—Grounds upon which an order for transfer should be made. Held*, on a construction of s. 526 of the Code of Criminal Procedure, that the law does not intend that a transfer of a case should be ordered simply because an accused person thinks that he would not get an impartial trial; but the real question to be considered is whether on the facts disclosed in the application for transfer there arises a reasonable inference that the Magistrate who is seised of the case may be prejudiced wittingly or unwittingly against the accused. *Sumeshwar* v. *King-Emperor, 12 All. L. J. 33, Empress* v. *Nobo Gopal Bose, I. L. R. 6 Calc. 491, Farzand Ali* v. *Hanuman Prasad, I. L. R. 19 All. 64, Dupeyron* v. *Driver, I. L. R. 23, Calc. 495, Serjeant* v. *Dale, 2 Q. B. D. 558, Leeson* v. *General Council of Medical Education and Registration, 43 Ch. D. 366, Queen* v. *Meyer, 1 Q. B. D. 173, Queen* v. *Handsley, 8 Q. B. D. 383, Allinson* v. *General Council of Medical Education and Registration, [1894] 1 Q. B. 750. The Queen* v. *Allan, 4 B. & S. 915*, and *Girish Chunder Ghose* v. *The Queen-Empress, I. L. R. 20 Calc. 857*, referred to. EMPEROR *v.* JAGGAN (1914)

I. L. R. 36 All. 239

——— **s. 528**—*Transfer—Effect of appointment of a Magistrate to be Chairman of a municipal board. Held*, that when a Magistrate is appointed to the post of Chairman of a municipal board and has taken over charge, he thereby becomes divested of his ordinary functions as a Magistrate, or if he retains any, he is no longer a "Magistrate subordinate to the District Magistrate," within the purview of s. 528 of the Code of Criminal Procedure. EMPEROR *v.* NATHI MAL (1914) . . . . **I. L. R. 36 All. 513**

CRIMINAL TRESPASS.

See PENAL CODE (ACT XLV OF 1860), s. 447 . . **I. L. R. 36 All. 474**

——— *Unanimous verdict of Jury—Criminal Procedure Code (Act V of 1898), s. 307—Reference to High Court whether permissible in such a case—Penal Code (Act XLV of 1860), ss. 148, 304, 326, 149—Absence of charge—Acquittal.* Criminal trespass depends on the intention of the offender and not upon the nature of the act, and when the man's intention is to save his family and property from imminent destruction it cannot be said that because he commits civil trespass on his neighbour's land and cuts a portion of the *bund* belonging to his neighbour which he ordinarily would not be justified in doing, he is guilty of any criminal offence. Where the verdict of the Jury is unanimous and the Judge has agreed with it, he can make no reference under s. 307 of the Criminal Procedure Code, Where the accused were charged under ss. 148, $\frac{304}{109}$, and $\frac{325}{149}$ and the Jury found them guilty under s. 326 only: *Held*, that the verdict of the Jury under s. 326 was a judgment of acquittal inasmuch as there being no charge under that section independently, there could be no verdict given upon it. *Riazzudi* v. *King-Emperor 16 C. W. N. 1077, Panchu Das* v. *Emperor, I. L. R. 34 Calc. 698*, referred to. EMPEROR *v.* MADAN MANDAL AND OTHERS (1913)

I. L. R. 41 Calc. 662

CRIMINAL TRIAL.

See JURISDICTION.

I. L. R. 41 Calc. 305

CROSS-EXAMINATION.

——— **question put in—**

See DEFAMATION.

I. L. R. 41 Calc. 514

——— *Postponement—Sessions trial—Application by defence counsel to postpone cross-examination till next day—Trial for murder—Refusal by Judge, effect of—Prejudice to accused—Re-trial—Practice.* Where, at a Sessions trial, the defence counsel applied, after the examination-in-chief of the first prosecution witness, for postponement of the cross-examination of the witnesses till the next day, on the ground of his unpreparedness, but did not ask for an adjournment of the trial itself: *Held*, that the application was a reasonable one which the Judge should, under the circumstances, have allowed. Though the accused is not entitled to such postponement as of right, the Court may, in a proper case, grant the indulgence. Where the result of the refusal of such application was that the witnesses examined on its date, four of whom were important, were not cross-examined by counsel or pleader, and the witnesses subsequently examined were inefficiently cross-examined and the cross-examination of the former witnesses might have elicited matters as to which the subsequent witnesses might have been cross-examined: *Held*, that the accused were pre-

CROSS-EXAMINATION—*concld.*

judiced, and that there should be a re-trial by another Judge. SADASIV SINGH *v.* EMPEROR (1913) **I. L. R. 41 Calc. 299**

CROSS-OBJECTIONS.

See CIVIL PROCEDURE CODE (1908), O. XLI, R. 22 . **I. L. R. 36 All. 505**

CROWN GRANTS ACT (XV OF 1895)

——— **ss. 2, 3—**

See REGISTRATION ACT (XVI OF 1908), SS. 17, 90 . . **I. L. R. 36 All. 176**

CUSTODY.

See MINOR . . **L. R. 41 I. A. 314**

CUSTODY OF CHILD.

See KIDNAPPING.
I. L. R. 41 Calc. 714

CUSTOM.

See BABUANA AND SOHAG GRANTS.
L. R. 41 I. A. 275

See CIVIL PROCEDURE CODE (1908), S. 100.
I. L. R. 36 All. 256

See MAHOMEDAN LAW—PRE-EMPTION.
I. L. R. 38 Bom. 183

See PRE-EMPTION.
I. L. R. 36 All. 451, 471

See PRIMOGENITURE . **18 C. W. N. 55**

——— plea of—

See THEFT . **I. L. R. 41 Calc. 433**

CUSTOM OR CONTRACT.

See MADRAS ESTATES LAND ACT (I OF 1908), SS. 9, 11, 151, 157, 187 (*g*).
I. L. R. 37 Mad. 432

D

DACOITY.

——— *Assessors—Questioning Assessors before delivery of their opinion—Charge alleging preparation to commit dacoity by assembling with masks, arms and implements—Acquittal of preparation, and conviction of assembling—Repugnancy in the findings, effect of—Appellate Court, power to alter finding of acquittal into one of conviction—Search—Irregularities in search, effect of—Right of accused to urge technical points—Necessity of cross-examination by accused on point when allegations of fraud and dishonesty are made—Presumption of knowledge from possession of incriminating articles—Criminal Procedure Code (Act V of 1898), ss. 103, 309, 423—Distinction between offences of preparation and assembling—Penal Code (Act XLV of 1860), ss. 399 and 402—"Occupant of the place."* A Judge ought not to put a long list of questions to the assessors before they have stated

DACOITY—*contd.*

their own opinions, and then record their answers to them. He should allow them in the first instance to give their opinions in their own language and way, and he may then put to them such questions as are necessary to elucidate or supplement their opinions. Where the accused were charged, under s. 399 of the Penal Code, with making preparations to commit dacoity by assembling together with masks, arms and implements which might be used for that purpose, and the Judge found that there had been such assembly with such articles, but that there was not sufficient evidence of preparation and acquitted them under s. 399 but convicted them under s. 402 of the Penal Code: *Held*, that there was no repugnancy in his findings as, though he was of opinion that the accused did not commit an offence under s. 399 by assembling with masks, arms and implements, he had found that they did assemble, within the meaning of s. 402, and that the discovery of these articles with the other circumstances of the case, showed that the purpose of the assembly was to commit dacoity. In a popular sense assembling to commit dacoity may be an act of preparation for it, but a mere assembling, without further preparation, is not "preparation" within s. 399 of the Penal Code. Section 402 applies to mere assembling without proof of other preparation. A person may be not guilty of dacoity, yet guilty of preparation, and not guilty of preparation yet guilty of assembling. Evidence of the findings of masks, arms and implements at the place of the assembling is not necessary to constitute the offence under s. 402, but only to indicate the purpose of the assembling. *Per* CURIAM: Even if there was a repugnancy in the Judge's findings, the High Court has power to alter the finding of acquittal, under s. 399 of the Penal Code, into one of conviction thereunder, maintaining the sentence. *Queen-Empress* v. *Jabanulla, I. L. R. 23 Calc. 975, Nazimuddin* v. *Emperor, I. L. R. 40 Calc. 163, Appanna* v. *Pithani Mahalakshmi, I. L. R. 34 Mad. 545, Golla Hanumappa* v. *Emperor, I. L. R. 35 Mad. 243,* and *Emperor* v. *Sardar, I. L. R. 34 All. 115,* followed. *Satish Chandra Das* v. *Queen-Empress, I. L. R. 27 Calc. 172, Kunja Bhuiya* v. *Emperor, I. L. R. 39 Calc. 896,* held not in point. *Per* BEACHCROFT, J.—There is no provision in the Code justifying interference with a conviction on the ground of repugnancy in the record. Repugnancy in the verdict of a Jury in India is not by itself a sufficient ground, in view of s. 423 (*2*) of the Code, to quash the conviction. *Per* WOODROFFE, J.—A search is irregular if it is conducted in violation of the police rules relating thereto, such as the omission to make, at the time, a note of the articles found and where found, the permitting of unauthorized persons to go in and out of the place searched, and the omission to send up the articles found as soon as possible to the Magistrate. The exclusion of the occupants of the place during the search is not a technical, but a substantial violation of the law. The effect, however, of such regularities is to necessitate a careful scrutiny of the evidence of search, but if, notwithstanding the irregularities, the Court holds

DACOITY—*concld.*

that no advantage has, or could have been, taken of them, they have no further effect. *Per* BEACHCROFT, *J.*—The spirit of s. 103 requires that an option be given to the "occupant" of the place searched to be present at it, and not that he is to be allowed to be present only on demand. The words "occupant of the place" refer to persons residing in, or being in charge of, the place, but it is desirable in practice that any person against whom an inference may be drawn from the finding of articles should be present at the search. If the *bonâ fides* of the search is impeached, it must be shown that the law has been ignored, and an inference against *bonâ fides* will not arise from the mere failure to exercise a wise discretion on the part of the officers conducting the search. *Per* WOODROFFE, *J.*—The accused are entitled to urge any defence open to them, technical or otherwise, and to have the Court's judgment on it, but (*per* BEACHCROFT, *J.*) the technicality must be one found in the Code and not based on peculiar rules of the English law. It is not for the accused to supplement or explain deficiencies or suspicious circumstances in the prosecution case. They may refer to them to show suspicious character of the evidence, but if they put forward a case of fraud, or if the prosecution evidence is not ambiguous, they should cross-examine the witnesses on the point so as to give the prosecution an opportunity of explanation. If incriminating articles are found in a place, knowledge of their being there cannot, without other evidence, be imputable to any one other than the occupants, nor would the presumption operate even against him if they might have been placed there without his knowlegde. *Per* BEACHCROFT, *J.*—When an article is found in a man's house, the ordinary presumption is that he, as owner of the house, is aware of its existence, provided that no other person has access to that particular place. If the house is occupied by more persons than one having access to the particular place, there is no presumption against them individually that they have put the article where it is found, though if it has been for a considerable time in a place to which all have frequent access, it might reasonably be presumed that all were aware of its existence. RAMESH CHANDRA BANERJEE *v.* EMPEROR (1913)
I. L. R. 41 Calc. 350

DAMAGE.

See DAMAGES.

See IRRIGATION ACT (BOMBAY).
I. L. R. 38 Bom. 116

——— **actual, when necessary to support action—**

See EASEMENT . **I. L. R. 37 Mad. 527**

——— **remoteness of—**

See SECRETARY OF STATE.
I. L. R. 37 Mad. 55

DAMAGES.

See CONTRIBUTORY NEGLIGENCE.
I. L. R. 41 Calc. 308

DAMAGES—*concld.*

——— **measure of—**

See CONTRACT ACT (IX OF 1872), SS. 39, 55, 63, 73 . **I. L. R. 37 Mad. 412**

——— **quantum of—**

See NEGLIGENCE.
I. L. R. 38 Bom. 552

——— **suit for—**

See CAUSE OF ACTION.
I. L. R. 41 Calc. 825

See RAILWAY RECEIPT.
I. L. R. 38 Bom. 659

——— **time at which, should be computed—**

See CONTRACT ACT (IX OF 1872), SS. 39, 55, 63, 73 . **I. L. R. 37 Mad. 412**

DANDIDARI RIGHT.

——— *Dandidari right, if a monopoly or a legal right to be recognised be Courts of Justice—Such right if personal or if can be transferred—Transfer, if must be by registered instrument—Estoppel, application of rule of, to employés and contracting parties—Assignee of right having enjoyed profits, if can deny assignor's title.* At a public auction held at the instance of Government the plaintiff as the highest bidder purchased the road-side lands on the bank of a river together with the *dandidari* right for one year. It appeared from the lease granted to him by Government that he became entitled to occupy the lands for one year and to exercise the calling of a broker in the market held thereon during that period. The defendants took an assignment from the plaintiff of the *dandidari* right and they commenced at once to exercise the calling of a broker in the market place by virtue of the Government license which was made over to them, but they withheld payment of the money they had agreed to pay. The plaintiff sued for recovery of the consideration with damages for unlawful detention of his money: *Held*, that the term *dandidar* literally means a measurer and is applied to signify a broker who negotiates the sale of paddy and other produce in a market-place and receives as remuneration for his service a commission from the seller and the buyer who may choose to employ him. That the contention of the defendants that the alleged *dandidari* right tended to create a monopoly and should not be recognised as a legal right by any Court of Justice was untenable. The principle that every arrangement which places a restriction upon a man's right to exercise his trade or calling tends to create a monopoly and is void as against public policy, has no application to the present case. There is nothing illegal or contrary to public policy in Government allowing a market to be held on its land and taking measures to restrict the admission of brokers. That the *dandidari* right was not a right personal to the grantor from Government and could be transferred. The very fact that the right was granted by Government to the highest bidder affords some indication that the personal element does not enter into consideration when the grant is made. That the

DANDIDARI RIGHT—*concld.*

dandidari right was transferable only by a registered instrument. That the defendants were at least licensees under the plaintiff and as they had exercised their calling without interruption or interference they at any rate were not entitled to contend that the plaintiff had no title or that they themselves had acquired none from him. LAKHAN JENA *v.* ARJUN NAIK (1914) . **18 C. W. N. 1194**

DARBHANGA RAJ.

See BABUANA GRANT.

DAUGHTER-IN-LAW.

——— **right to maintenance—**

See HINDU LAW—MAINTENANCE.
I. L. R. 37 Mad. 396

DAUGHTERS.

——— **bequest to—**

See HINDU LAW—WILL.
I. L. R. 41 Calc. 1007

DAUGHTER'S SONS.

See WILL . **I. L. R. 38 Bom. 697**

DEBT.

See CIVIL PROCEDURE CODE (1908), O. XXI, RR. 46, 546.
I. L. R. 37 Mad. 51

See HINDU LAW—DEBT.

DEBTOR AND CREDITOR.

——— *Acknowledgment of debtor's liability by another and acceptance of same by creditor—Rights of creditor—Novation—"Consideration"—Administration of justice in Courts in India on general principles of equity and justice—Contract Act (IX of 1872), ss. 2 (d) and 62.* Where the transferee of a debtor's liability has acknowledged his obligation to the creditor for the debt to be paid by him, under the provisions of the registered instrument conveying to him all the moveable and immoveable properties of the original debtor, and the acknowlegdment was communicated to the creditor and accepted by him: *Held, first,* that the arrangement between the creditor and the transferee did not amount to a *novation* within the meaning of s. 62 of the Contract Act; *secondly,* that the obligation undertaken by the transferee was for, and intended to be for, the benefit of the creditor; and, *lastly,* that the creditor is entitled to sue the transferee on the registered instrument. *Tweddle* v. *Atkinson, 1 B. & S. 393; 121 E. R. 762,* is inapplicable in British Courts in India. *Khwaja Muhammad Khan* v. *Husaini Begam, I. L. R. 32 All. 410; L. R. 37 I. A. 152, Gregory and Parker* v. *Williams, 3 Mer. 582; 36 E. R. 224, Touche* v. *Metropolitan Railway Warehousing Company, L. R. 6 Ch. App. 671,* and *Gandy* v. *Gandy, 30 Ch. D. 57,* referred to. The definition of "consideration" in the Indian Contract Act is wider than the requirement of the English law. The aim

DEBTOR AND CREDITOR—*concld.*

of the mofussil Courts of justice in British India is to do complete justice in one suit according to the general principles of justice, equity and good conscience. *Rambux* v. *Chittangeo Modoosoodhun Paul Chowdhry, B. L. R. Sup. Vol. 675; 7 W. R. 377,* referred to. DEBNARAYAN DUTT *v.* CHUNILAL GHOSE (1913) . . . **I. L. R. 41 Calc. 137**

DECLARATORY SUIT.

See SPECIFIC RELIEF ACT (I OF 1877), S. 42 . . **I. L. R. 36 All. 312**

DECREE.

See CIVIL COURTS ACT (XIV OF 1869), S. 32 . . **I. L. R. 38 Bom. 662**

See CIVIL PROCEDURE CODE (1882), SS. 268, 278, 283.
I. L. R. 38 Bom. 631

See CIVIL PROCEDURE CODE (1908), S. 60, CL. (2) (*b*) . **I. L. R. 38 Bom. 667**

See CIVIL PROCEDURE CODE (1908), SS. 68, 70, R. 14; O. XXI, R. 101.
I. L. R. 38 Bom. 673

See CIVIL PROCEDURE CODE (1908), S. 97.
I. L. R. 38 Bom. 331

See CIVIL PROCEDURE CODE (1908), O. XXI, R. 7 . **I. L. R. 38 Bom. 194**

See FRAUD . **I. L. R. 41 Calc. 990**

See LIMITATION ACT (IX OF 1908), S. 15.
I. L. R. 38 Bom. 153

——— **form of—**

See HINDU LAW—JOINT FAMILY.
I. L. R. 37 Mad. 435

See MORTGAGE . **I. L. R. 36 All. 123**

——— **form of, in suit for redemption—**

See MORTGAGE . **I. L. R. 36 All. 36**

——— **on mortgage—**

See MORTGAGE . **I. L. R. 38 Bom. 24**

——— **satisfaction of—**

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), S. 257A.
I. L. R. 38 Bom. 219

1. ——— *Construction of, whether executable or merely declaratory—Appeal against preliminary order after passing of final order, maintainability of—What orders in execution are appealable—Civil Procedure Code (Act V of 1908), ss. 2, 47.* A decree which does not direct possession of any of the suit lands to be given to plaintiff who sued for possession of all the lands in suit but merely declared the right of the defendant to remain in possession of a portion of the lands of the whole of which she was in possession, is one that is not capable of execution by the plaintiff, by way of possession of the rest being given to him, especially when there was not even a declaration of plaintiff's

DECREE—*contd.*

right to the rest of the lands. A question whether a decree is executable or not is certainly one that comes within ss. 2 and 47 of the Civil Procedure Code (Act V of 1908), the former of which enacts that the determination of any questions within s. 47 is a decree; an appeal lies from such determination under section 2. The determination of a mere issue by the executing Court, made prior to the passing of the final order, would not be regarded as an adjudication between the parties against which an appeal would lie. *Venkatagiri Iyer* v. *Sadagopachariar, 14 Mad. L. J. 359*, referred to. Orders in execution which declare (i) that execution shall issue and that a Commissioner be appointed for carrying out execution, (ii) that interest is payable, and (iii) that a party is entitled to mesne profits are appealable, though the final orders determining the extent of amount will have to be passed only thereafter. *Narayana Pattar* v. *Gopalakrishna Pattar, I. L. R. 28 Mad. 355, Ram Kirpal* v. *Rup Kuari, I. L. R. 6 All. 269, Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh, I. L. R. 23 All. 152, Maharaja of Burdwan* v. *Tara Sundari Debi, I. L. R. 9 Calc. 619*, and *Deoki Nandan Singh* v. *Bansi Singh, 14 C. L. J. 35*, referred to. *Held*, that an appeal against a preliminary order in execution can be filed even after the date of the final order, which merely carries out and is consequential on the preliminary order, though no appeal has been filed against the final order. *Uman Kunwari* v. *Jarbhandan, I. L. R. 30 All. 479*, followed. *Mackenzie* v. *Narsingh Sahai, I. L. R. 36 Calc. 762, Kuriya Mal* v. *Bishambhar Das, I. L. R. 32 All. 225, Madhu Sudan* v. *Kamini Kanta Sen, I. L. R. 32 Calc. 1023, Baikuntha Nath Dey* v. *Nawab Salimulla Bahadur, 12 C. W. N. 590*, and *Narain Das* v. *Balgobind, 8 All. L. J. 604*, not followed. Similarly an appeal against an order of remand can be filed even after the date of the final decree consequential on remand. *Subba Sastri* v. *Balachandra Sastri, I. L. R. 18 Mad. 421*, and *Mullikarjuna* v. *Pathaneni, I. L. R. 19 Mad. 479*, followed. Where a right and jurisdiction are conferred expressly by statute they cannot be taken away or cut down except by express words or by necessary implication. When the law gives a person two remedies, he is entitled to avail himself of either of them unless they are inconsistent. There is no question of election in such cases, *Gulab Koer* v. *Badshah Bahadur, 13 C. W. N. 1197*, followed. With the reversal of the earlier order the later order which depends for its validity upon the earlier one, *ipso facto* ceases to have any force. LAKSHMI *v.* MARU DEVI (1914)
I. L. R. 37 Mad. 29

2. ——— *Assignment of decree to defeat creditors—Transfer made for valuable consideration, but not bonâ fide—Transfer of Property Act (IV of 1882) s. 53—Statute 13 Eliz., c. 5—Validity of transfer of moveable property—Practice of Privy Council—Point not before Courts below.* In this case the Judicial Committee upheld the decision of the High Court as to the invalidity of certain assignments which though for good consideration were made to defeat creditors; and *held* that the question whether any of the parties could establish right based not on the assignments but on other grounds such as the actual payment of debts, was a point not before the Courts below, and therefore their Lordships would not decide it. CHIDAMBARAM CHETTIAR *v.* SRINIVASA SASTRIAL (1914) . . . . **I. L. R. 37 Mad. 227**

3. ——— *Decree incapable of execution—Amendment of decree—Limitation—Time if runs from date of amendment.* A decree which does not specify the reliefs granted, is incapable of execution and cannot be considered as time-barred and legally dead even though three years have elapsed from the date of the decree. An application for execution of a decree for rent which was originally incapable of execution, is not barred by limitation, although presented more than three years after the date of decree but within three years from the date of amendment of the decree making it capable of execution. MOHAMAYA PROSAD SINGH *v.* ABDUL HAMID (1913)
18 C. W. N. 266

DECREE, EX PARTE.

See CIVIL PROCEDURE CODE (1908), S. 148 O. IX, R. 13 . **I. L. R. 36 All. 77**

See EX PARTE DECREE.

DECREE FOR RENT.

See LANDLORD AND TENANT.
I. L. R. 41 Calc. 926

DEED OF TRUST.

——— **construction of—**

See TRUST . . **I. L. R. 41 Calc. 19**

DEFAMATION.

See PENAL CODE (ACT XLV OF 1860), S. 498 . **I. L. R. 37 Mad. 110**

See PRIVY COUNCIL, PRACTICE OF.
I. L. R. 41 Calc. 1023

——— *Defamation by pleader—Questions put in cross-examination on instructions without ascertaining their truth or falsity—Absence of personal malice—Presumption of good faith—Rebuttal of presumption—Duty of Advocate—Public good—Penal Code (Act XLV of 1860), s. 499, Exception (9).* A pleader is entitled to the presumption that the questions he asks in cross-examination are put in good faith for the protection of his client's interest, within Exception (9) to s. 499 of the Penal Code. To rebut the presumption it is not sufficient merely to show that the client knew the imputation to be untrue, but there must be convincing evidence that the pleader was actuated by an improper motive personal to himself and not by a desire to protect or further his client's interest. *Upendra Nath Bagchi* v. *Emperor, I. L. R. 36 Calc. 375; 13 C. W. N. 340*, followed. It is the duty of the pleader to present his client's case, but it is not his duty to enquire whether it is true or false, so far,

DEFAMATION—*concld.*

at any rate, as the purpose of a prosecution for defamation is concerned. It is for the public good that a person charged with the responsibility of an advocate should, as far as may be, feel unfettered by any control, other than that of the Court, in the use of every weapon placed at his disposal by law for the defence of his client. NIKUNJA BEHARI SEN *v.* HARENDRA CHANDRA SINHA (1913) . . **I. L. R. 41 Calc. 514**

DEFAULTING PROPRIETOR.

——— payment by—

See SALE FOR ARREARS OF REVENUE.
I. L. R. 41 Calc. 1092

DEFECT.

See CHARGE . . **I. L. R. 41 Calc. 66**

DEFECTIVE DECLARATION.

See INSURANCE.
I. L. R. 41 Calc. 581

DEFENDANT.

See PROBATE . **I. L. R. 41 Calc. 819**

DEKKHAN AGRICULTURISTS' RELIEF ACT (BOM. XVII OF 1879).

See CIVIL PROCEDURE CODE (ACT V OF 1908), SS. 2, 97, O. XXVI, RR. 11, 12 (*2*).
I. L. R. 38 Bom. 392

——— ss. 2 (*2*) 10A—*Evidence Act (I of 1872), s. 92—Agriculturist—Mortgage in form of sale—Redemption suit—Intention of the parties at the time of the transaction.* The object of s. 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is not to enable a party to the suit to prove, notwithstanding the words of the document, what the real intention was at the time when the document was executed. Regard must be paid to the date of the transaction and an agriculturist can only be allowed, according to the provisions of s. 10A, to enjoy the special benefit of the favoured class in disregarding the provisions of s. 92 of the Evidence Act (I of 1872), if he belonged to the favoured class as defined by the statute at the date of the transaction. SAWANTRAVA *v.* GIRIAPPA FAKIRAPPA (1913) . . **I. L. R. 38 Bom. 18**

——— s. 48—

See LIMITATION.
I. L. R. 38 Bom. 656

DELAY.

——— effect of—

See SPECIFIC RELIEF ACT (I OF 1877), SS. 15, 17 . **I. L. R. 37 Mad. 403**

——— excuse of—

See LIMITATION . **I. L. R. 38 Bom. 653**

DELEGATION.

See CRIMINAL PROCEDURE CODE, S. 17.
I. L. R. 36 All. 468

DELIVERY OF POSSESSION.

See RIOTING . **I. L. R. 41 Calc. 43**

DELIVERY ORDER.

See CARRIERS . **I. L. R. 41 Calc. 703**

DENATURED SPIRIT.

See EXCISE . **I. L. R. 41 Calc. 694**

DEPOSIT.

——— of money—

See LIMITATION ACT (IX OF 1008), S. 17.
I. L. R. 37 Mad. 175

DEPOSIT IN COURT.

——— *Putni rent—Bengal Tenancy Act (VIII of 1885), ss. 54, 61, 62 (2), 125 (e)—Putni Regulation (VIII of 1819).* Section 61 of the Bengal Tenancy Act is applicable to a *putnidar*, as it does not in any way affect the Regulation VIII of 1819 relating to *putni* tenures, and it is open to him to deposit the *putni* rent in Court. BATA KRISHNA RANO *v.* JANKI NATH PANDE (1914)
I. L. R. 41 Calc. 1000

DESCRIPTION OF PROPERTY.

See SALE IN EXECUTION OF DECREE.
I. L. R. 41 Calc. 590

DESTRUCTION OF IMAGE

See IMAGE . . **I. L. R. 41 Calc. 57**

DEVASTANAM COMMITTEE MEMBER.

See HINDU LAW—DEBT.
I. L. R. 37 Mad. 458

DIGWARI TENURE.

——— *Incidents of Digwari tenure—Limitations subject to which such tenures are hereditary—Powers of Government to decide fitness of heir—Sanction of Government, if means prior approval—Jurisdiction of Courts—Grounds of disapproval of heir by Government, if open to review by the Court—Sanction of Government, if may be withheld on grounds other than that of fitness—Temporary appointment, if signifies approval of fitness for permanent post.* One *K*, who was a Sardar Digwar, was dismissed for neglect of duty and improper conduct, and two persons were successively appointed to the post, and ultimately the plaintiff's father. Thereafter on the recommendation of the police for the re-employment of *K*, *K* was informed that in the case of a vacancy occurring, the appointment would be first offered to him. Prior to his death, the plaintiff's father was allowed leave for six months and the plaintiff was appointed as being a fit person to act in his place. On the death of his father the plaintiff was directed by the District Magistrate to act in place of his deceased father until further orders. The widow of *K* thereupon applied to the District Magistrate on behalf of her minor son praying that he might be appointed in accordance with the promise made to his father,

DIGWARI TENURE—*concld.*

but the District Magistrate rejected her application and confirmed the appointment of the plaintiff. The Divisional Commissioner reversed this decision of the District Magistrate and appointed *K's* son not on the ground of plaintiff's unfitness, but upon his view of the legal rights of the parties. On appeal to the Lieutenant-Governor, the plaintiff was referred for remedy to the Civil Court and brought his suit: *Held*, that a Digwari tenure in the district of Bankura, which is similar to a Ghatwali tenure is hereditary, but the right of the heir to the tenure is subject to the approval or sanction of the Government, and notwithstanding that the tenure is hereditary, the Government has the power of dismissing the Ghatwal for misconduct. *Per* N. R. CHATTERJEA, *J.*—When a Ghatwal is dismissed and has no male member of the family fit to be appointed at the time of his dismissal, there is a forfeiture of the tenure so far as his family is concerned, and wherein such a case a stranger to the family is permanently appointed in his place, a subsequently born son of the dismissed Ghatwal on the death of the latter and after the tenure has passed to another family, cannot claim it on the ground that it is his hereditary tenure. It is for the Government to say whether the heir is a fit and proper person, and so far as that question is concerned, the Government is the sole judge, and the Civil Courts cannot go into that question; but the Government cannot disapprove of the heir or withhold its sanction upon any ground it likes, and apart from the question whether he is a fit and proper person. That in the present case, having regard to the proceedings taken, the plaintiff should be held to have been approved by Government as a fit and proper person. *Per* FLETCHER, *J.*—Sanction in its ordinary signification means prior approval and implies a power to disapprove. It would be contrary to the practice in India to hold that the approval of a person to hold an appointment in an acting capacity is an approval of him for the permanent post. In view of the authorities that the Court cannot interfere to reinstate a person who has actually been in possession of the Ghatwali land, it must be held that the Court cannot interfere in favour of a person who has never in fact been appointed Ghatwal. That in the present case the plaintiff failed to obtain the sanction of the Government which was a condition precedent to his succeeding to the Ghatwali lands. That the decision of the executive authorities refusing to sanction the appointment of the heir of a deceased Ghatwal as Ghatwal cannot be challenged in the Civil Court on the ground that sanction has been unreasonably withheld. A Civil Court is not in a position to determine what are the qualifications necessary in a Ghatwal. It is a matter solely for the executive authorities. *Nilmoney Singh* v. *Bikranath Singh, I.L.R. 9 Calc. 187, 199, Jogendra Nath Singh* v. *Kali Charan Roy, 9 C. W. N. 663, Debe Narain Singh* v. *Sree Kishen Sein, 1 W. R. 321, Secretary of State* v. *Poran Singh, I. L. R. 5 Calc. 470, Lal Dharee Roy* v. *Brojo Lal Singh, 10 W. R. 401*, considered. HEMENDRA NATH ROY *v.* UPENDRA NARAIN ROY (1914) . **18 C. W. N. 1036**

DILUTION OF SPIRIT.

See EXCISE . **I. L. R. 41 Calc. 694**

DILUVION.

See LANDLORD AND TENANT.
I. L. R. 41 Calc. 683

DIRECTORS.

———— powers of—

See COMPANY . **I. L. R. 36 All. 412**

DISCHARGE.

See CRIMINAL PROCEDURE CODE, SS. 119, 437 . . . **I. L. R. 36 All. 147**

DISCHARGE OF ACCUSED PERSON.

See CRIMINAL PROCEDURE CODE, S. 437.
I. L. R. 36 All. 53

DISCIPLINARY ACTION.

See ATTORNEY . **I. L. R. 41 Calc. 113**

DISCIPLINARY JURISDICTION.

See PROFESSIONAL MISCONDUCT.
I. L. R. 41 Calc. 113

DISCOVERY.

———— *Interrogatories— Code of Civil Procedure (Act V of 1908), O. XI—Practice.* A party is entitled to interrogate on facts directly in issue on the pleadings. In a suit for the recovery of the amount of a *hundi*, alleged to have been drawn and accepted by the defendant in consideration of a loan: *Held*, that the defendant was entitled to discovery of the form in which the loan was alleged to have been made, and of the time and place the *hundi* was drawn and accepted, and the time and place and the names and addresses of the persons by whom it was presented. *Ali Kader Syud Hossain Ali* v. *Gobind Dass, I. L. R. 17 Calc. 840*, distinguished. BAIJNATH KEDIA *v.* RAGHUNATH PRASAD (1913) . . **I. L. R. 41 Calc. 6**

DISCRETION OF COURT.

See PRE-EMPTION.
I. L. R. 36 All. 573

See PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), SS. 15 (*2*) AND 21 (*1*).
I. L. R. 38 Bom. 200

See SANCTION FOR PROSECUTION.
I. L. R. 41 Calc. 446

DISCRETIONARY RELIEF.

See ELECTION . **I. L. R. 41 Calc. 384**

DISHONEST INTENTION.

See CRIMINAL BREACH OF TRUST.
I. L. R. 41 Calc. 844

DISTRAIN.

———— for cess—

See MADRAS ESTATES LAND ACT (I OF 1908), S. 77 . **I. L. R. 37 Mad. 319**

DISTRICT JUDGE.

——— powers of—

See PROVINCIAL INSOLVENCY ACT (III OF 1907), s. 36.

I. L. R. 36 All. 549

DISTRICT MAGISTRATE.

See CRIMINAL PROCEDURE CODE, s. 17.

I. L. R. 36 All. 468

DIVORCE.

See DIVORCE ACT.

See KIDNAPPING.

I. L. R. 41 Calc. 714

See MAHOMEDAN LAW—DIVORCE.

——— *Husband's petition—Security for wife's costs—Practice.* In a husband's petition for dissolution of marraige, where both parties are subject to s. 4 of the Indian Succession Act (X of 1865), and the wife has no means of her own, the Court has a discretion to order the petitioner to furnish security for the respondent's costs. *Proby* v. *Proby, I. L. R. 5 Calc. 357, Young* v. *Young, I. L. R. 23 Calc. 916n, Thomas* v. *Thomas I. L. R. 23 Calc. 913, Thomson* v. *Thomson, I. L. R. 14 Calc. 580, Watling* v. *Watling, (1910) April 22* (unreported), *Jahans* v. *Jahans, 6 C. W. N. 414,* and *Mayhew* v. *Mayhew, I. L. R. 19 Bom. 293,* considered. BATEMAN *v.* BATEMAN AND NICACHI (1914) . . . . **I. L. R 41 Calc. 963**

DIVORCE ACT (IV of 1869).

——— **ss. 2, 4, 7, 45.**—*High Courts Act 24 & 25 Vict., c. 104, s. 9.—Amended Letters Patent of the Bombay High Court, cl. 35—Restitution of conjugal rights—Jurisdiction of the Bombay High Court to entertain a suit for the restitution of conjugal rights as against (a) a non-Christian respondent and (b) a respondent not residing within the Presidency—Principles and Rules of English Court for Divorce and Matrimonial Causes acted on in India—Refusal of Court to grant relief by restitution of conjugal rights when the respondent is absent from the jurisdiction when the suit is instituted and remains absent—Civil Procedure Code (Act V of 1908), s. 20 (corresponding to Act XIV of 1882, s. 17), applicability of to matrimonial suits—Residence, what amounts to, in order to give the Bombay High Court jurisdiction to pronounce a decree for the restitution of conjugal rights—Costs of unsuccessful petition by wife, rights of the petitioner's solicitors over monies deposited in Court by the respondent as security for the petitioner's costs and over monies deposited by a respondent-appellant as security for the costs of the appeal.* The respondent, a Parsi, married the petitioner, a Christian, in London. Subsequently the parties lived together for some time in London and then came out to Bombay where they also lived together for some time. Afterwards the parties returned to England, but, apparently owing to differences which had arisen between them, immediately on their arrival in London, at Victoria Railway Station, the respondent deserted the petitioner and never thereafter lived together again, the respondent having made up his mind about that time that he could not live with the petitioner. The respondent remained in England but the petitioner returned to Bombay with the intention of taking legal proceedings against the respondent there and did sue the respondent in the Bombay High Court claiming restitution of her conjugal rights. *Held,* that under s. 9 of the High Courts Act and cl. 35 of the Amended Letters Patent of the Bombay High Court, the jurisdiction exercised by the High Court in matrimonial matters previous to the coming into force of the Indian Divorce Act had been confined to matters between British subjects professing the Christian religion. *Held,* further, that as regards the jurisdiction confirmed to the Bombay High Court by s. 4 of the Indian Divorce Act (which included jurisdiction to entertain suits for the restitution of conjugal rights) the powers of the Bombay High Court were still limited to Christian subjects within the Presidency so that the High Court had no jurisdiction to grant a decree of restitution either against a Parsi respondent or against any respondent not within the Presidency. *Held,* further, that following the principles on which the Courts for Divorce and Matrimonial Causes in England have acted and given relief, which principles are made applicable in India under s. 7 of the Indian Divorce Act, the Bombay High Court could not give relief by way of restitution of conjugal rights if the respondent named in the petition were absent from the jurisdiction at the time the suit was instituted and remained absent, although residence at the date of the suit of both spouses, whatever their domicile might be, would be sufficient to give jurisdiction in suits of this nature. *Firebrace* v. *Firebrace, 4 P. D. 63, Chichester* v. *Chichester, 10 P. D. 186,* and *Armytage* v. *Armytage, [1898] P. 178,* followed. *Semble:* In the case of matrimonial offences including those other than adultery, the application of the Civil Procedure Code, s. 20 (corresponding to s. 17 of Act XIV of 1882), under s. 45 of the Indian Divorce Act involves the necessity of either residence on the part of the defendant or the accrual of the cause of action within the jurisdiction in order to enable the Court to entertain the suit. *Thornton* v. *Thornton, I. L. R. 10 Bom. 422,* referred to. *Semble:* Also, that mere residence in India at the time of the institution of a suit is not residence within the meaning of s. 2 of the Indian Divorce Act and that the residence of the petitioner should be *bonâ fide* and not casual or as a traveller. *Held,* however, that moneys deposited by a husband respondent as security for his wife's costs of a petition constituted a fund paid in for the benefit of her attorney who was entitled to have it applied for his benefit whatever the result of the petition, provided that he had been in no way to blame and that that rule applied to moneys deposited by a respondent appealing from the decision of the lower Court as security for the costs of the appeal in accordance with the rules of the Bombay High Court. NUSSERWANJEE WADIA *v.* ELEONORA WADIA (1913) . . **I. L. R. 38 Bom. 125**

DIVORCE ACT (IV OF 1869)—*concld.*

——— **ss. 17, 43, 57—**

See KIDNAPPING.

I. L. R. 41 Calc. 714

DOCUMENTS.

See SEARCH BY POLICE OFFICERS.

I. L. R. 41 Calc. 261

——— **admissibility of—**

See CIVIL PROCEDURE CODE (1908), SCH. II, CL. 11 . **I. L. R. 38 Bom. 60**

DOWER.

See COURT FEES ACT (VII OF 1870), SCH. I, ART. I . **I. L. R. 36 All. 322**

See MAHOMEDAN LAW—DOWER.

——— **possession in lieu of—**

See MAHOMEDAN LAW.

I. L. R. 36 All. 558

DUPLICITY.

See CHARGE . **I. L. R. 41 Calc. 66**

E

EASEMENT.

See EASEMENTS ACT.

1. ——— *Ancient Lights—Actionable Interference—Principle to be applied—Nuisance.* The owner or occupier of a tenement in respect of which an easement of light has been acquired by prescription, is entitled to a quantity of light the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement, according to the ordinary notions of mankind. The actual user will neither increase nor diminish the right. The question, in an action for obstruction, is whether the obstruction amounts to a nuisance. The effect of *Jolly* v. *Kine*, [*1907*] *A. C. 1*, is to establish that the law laid down in *Colls* v. *Home and Colonial Stores*, [*1904*] *A. C. 179*, is as formulated by Lord Davey in that case at p. 204, and as above stated. PAUL *v.* ROBSON (1914) . **L. R. 41 I. A. 180**

2. ——— *Water rights—Distinction between surface water, and water flowing in a definite channel.* No claim can be made either as a natural right or as an easement by prescription, to water which does not flow in a definite course, but which should be regarded as surface water or surface drainage. The right to the water of a stream does not cease, when it ceases to flow in a confined water-course, unless it exhausts itself as a stream, and merely soaks into the ground. The chief characteristic of surface water is its inability to maintain its identity and existence as a water body. When the flow of water on one person's land can be identified with that on another, a right to such flow can arise, although the

EASEMENT—*contd.*

water may flow along an intervening piece of land. Water flowing into a field from a known channel and passing along the field onwards into another field though not over a confined track in the former field, but along its whole area, is not surface water. Well-defined existence arising from an ascertained course is the real test in coming to a conclusion against any body of water being regarded as surface water. The question whether or not particular water is surface water is one of fact to be determined by the circumstances attending its origin and continued existence. The right to the water of a stream is sustainable notwithstanding the fact that the water in the stream is not always sufficient for the purpose for which the right is claimed, or that it reaches the plaintiff's land not directly but indirectly by flowing into another channel. A river channel supplied the means of irrigation for the lands of the parties to the suit, and the other ryots of the village. A branch leading from the main channel passed through the lands of defendants Nos. 1, 2 and 3 in a definite water-course, up to the fourth defendant's lands when it entered the fourth defendant's field, and after irrigating it, flowed, over its *bunds*, and joined another channel which irrigated the plaintiff's lands. Defendants Nos. 1, 2 and 3 blocked up the channel at a point higher than the fourth defendant's land. In a suit by plaintiff for declaration of his right to the customary supply of water through the channel, and for an injunction restraining the defendants from obstructing the water-course: *Held*, that the water of the channel when it entered the fourth defendant's field could not be regarded as surface water, but continued in a definite water-course, and plaintiff was entitled to the usual supply of water unobstructed. ADINARAYANA *v.* RAMUDU (1914)

I. L. R. 37 Mad. 304

3. ——— *Right of support—Disturbance—Actual damage when necessary, to support action—Temporary structure, whether an easement of support acquirable in respect of.* No actual damage is necessary to support an action for the disturbance of an easement of support for a building: *Contra* where the disturbance is of a natural right. *Backhouse* v. *Bonomi*, 9 H.L.C., 503, referred to. The rule requiring actual damage is applicable only to an action for damages, but actual damage is not necessary to entitle a person having a right of support, to relief by way of injunction. *Corporation of Birmingham* v. *Allen*, *6 Ch. D. 284*, followed. The question whether a right of support can be claimed for a temporary structure, which has been in existence for the statutory period, was not decided. *Maberlay* v. *Dowson*, *5 L. J. K. B. 261*, referred to. RAMAKRISHNA *v.* SEETHARAMA (1914)

I. L. R. 37 Mad. 527

4. ——— *Right to discharge surplus water across a public way, if may be acquired by prescription—Right acquired before dedication of way to public.* A person cannot by prescription acquire a right of easement to discharge surplus water from his own to another

EASEMENT—*concld.*

tenement through a channel across a public way intervening between the two tenements. To establish such a right he must prove that the public way was formerly private property, and the easement claimed had been acquired while it was still private property. KAILASH CHANDRA NANDY *v.* SURENDDA NATH SAMANTA (1913) **18 C. W. N. 378**

5. ———— *Right to take water from tank along defined route—Servient owner if may alter route—Dominant owner, if may insist on use of old route—Motive of servient owner, if material.* When the owner of a dominant tenement has acquired a prescriptive right to take water from a tank on the servient tenement and has for this purpose used a particular means of access for the statutory period, he has acquired a right to reach the water by means of such definite mode of access and the servient owner cannot at his discretion substitute for his use some other means of access, any more than the dominant owner himself can, at his discretion, take recourse to a different path. The dominant owner may insist on his right to use the old path, his motive in so doing being immaterial. JIBANANDA CHAKRABARTY *v.* KALIDAS MALLIK (1914) . **18 C. W. N. 1296**

EASEMENTS ACT (V OF 1882).

———— **ss. 18, 23.**—*Easement—Projection of eaves—Raising the height of the eaves—Burden on the servient tenement not to be increased—Customary easement—Privacy—Invasion.* The term "easement" as defined in the Easement Act (V of 1882) applied just as much to a projection of eaves in a dry country where there is no discharge of water as in a country where there is abundant rainfall and there is discharge of water. If a man has acquired an easement from a projection of his eaves to a fixed extent over his neighbour's land, he can raise the height of those eaves so long as he does not throw an increased burden on the servient tenement. The defendant constructed a window and apertures (*jalis*) in the back wall of his house and they commanded the plaintiff's *khadki* or courtyard which could be used for females to bathe and similar purposes of privacy. From the defendants' window the people sleeping in the plaintiff's house could be seen and from the apertures, though above a man's height, a person, if he was so inclined, could peep through into the plaintiff's house and the male apartment next to the open verandah (*osari*). The plaintiff having sued for an injunction restraining the defendant from making any openings in his wall: *Held*, that though it was doubtful whether the plaintiff was entitled to relief on the ground of the invasion of his privacy, still as there was a written agreement between the parties in the year 1870 whereby the defendant's father agreed that he would not make any opening in his back wall, the plaintiff had the right to require the defendant to close the said apertures and window. MULIA BHANA *v.* SUNDAR DANA (1913) . . . . **I. L. R. 38 Bom. 1**

EAVES.

———— **projection of—**

See EASEMENTS ACT (V OF 1882), SS. 18, 123 . . . **I. L. R. 38 Bom. 1**

EJECTMENT.

See AGRA TENANCY ACT (II OF 1901), S. 194 . . **I. L. R. 36 All. 441**

See EJECTMENT, SUIT FOR.

See HINDU LAW—ADOPTION. **I. L. R. 37 Mad. 529**

See JURISDICTION. **I. L. R. 41 Calc. 915**

See LANDLORD AND TENANT—EJECTMENT.

1. ———— *Plaintiff to prove title.* In order to succeed in an action of ejectment the plaintiff must strictly prove his title. RAMCHANDRA MARTAND WAIKER *v.* VINAYAK VENKATESH KOTHEKAR, (1914) . **18 C. W. N. 1154**

2. ———— *Landlord and Tenant.—Right of lessee after expiry of lease, to eject a trespasser.* Where a lessee whose lease had expired prior to suit, sued for possession of the land leased to him from a trespasser: *Held*, that the expiration of the lease did not necessarily imply the expiration of the lessee's right of possession, and the lessee was entitled to a decree for possession as against trespassers *a fortiori* where the landlord acquiesced in plaintiff getting a decree. *Gibbins* v. *Buckland, L. J. 32 Exch. 156*, and *Knight* v. *Clarke, 15 Q. B. D. 294*, referred to. VENKAYYA *v.* SATTEYYA (1914) **I. L. R. 37 Mad. 281**

EJECTMENT, SUIT FOR.

———— *Suit based on title to recover possession—Presumption of right arising from possession applies as much to defendant as to plaintiff—Plaintiff to prove such possession as will give him better title—Proof of such title as carries a present right to possession—Determination of annual tenancy—Notice to quit—Relinquishment of tenancy gives no right to present possession—Jus tertii.* In a suit based on title to recover possession, the presumption of right arising from possession applies as much to a defendant as to a plaintiff and the fact of possession within twelve years of suit will not avail the plaintiff unless it is shown to be such a possession as gives a better title to the land than the defendant can show. To succeed in ejectment it is only necessary for the plaintiff to establish such title as carries a present right to possession. Ordinarily, unless there is an express agreement for the expiry of a tenancy on a certain day, a tenancy from year to year is only determined by a notice to quit. It is a reasonable inference that if the plaintiff had not asserted his right as yearly tenant for eight years, he must be taken to have abandoned the tenancy or to have relinquished such other occupancy right as he might have, and, if so, he would have no right to present possession such as would entitle him to maintain a suit for ejectment. The defendant in ejectment might set up and prove *jus tertii*. The defendant is entitled to rely on the *jus tertii* appearing from the facts adduced by the plaint-

EJECTMENT SUIT FOR—*concld.*

iff to defeat his claim. SITARAM BHIMAJI *v.* SADHU (1913) . . **I. L. R. 38 Bom. 240**

ELECTION.

——— *Specific Relief Act (I of 1877), s. 42—Civil Procedure Code (Act V of 1908), s. 9—Discretionary Relief, principles on which granted—Delay—Indian Councils Act, 1909 (9 Edw. VII, c. 4), s. 6—Power of Governor-General in Council to make Regulations—Civil Court, jurisdiction of.* When a plaintiff seeking to impugn the validity of an election held on February 14, 1913, first made an application to the Governor-General in Council in accordance with Regulations framed under s. 6 of the Indian Councils Act, 1909, which Regulations provided that the decision of the Governor-General in Council on the intention, construction, or application of the Regulations should be final; and afterwards, when the election of the defendants had been declared to be valid by the Governor-General in Council, filed a suit on June 19, 1913, praying for a declaration that the election was invalid, and for an injunction restraining the defendants from exercising the functions of the office to which they had been elected *Held*, without deciding the question as to the jurisdiction of the Court and the power of the Governor-General in Council to make Regulations excluding that jurisdiction, that in the circumstances the Court should not exercise its discretionary jurisdiction under s. 42 of the Specific Relief Act in favour of the plaintiff. The Court in interfering in cases of disputed elections, should apply the principles followed by the Courts of Common Law in granting or refusing prerogative writs. BHUPENDRA NATH BASU *v.* RANJIT SINGH, (1913) . . . **I. L. R. 41 Calc. 384**

EMBANKMENT.

——— *Poolbundi charges—Contract between zemindar and putnidar as to payment of poolbundi charges—Change of law after contract—How far change affects the contractual relationship—Embankment Acts (XXXII of 1855 and Beng. VII of 1866)—Bengal Embankment Act (Beng. II of 1882), ss. 54 to 59, 68, 74.* An agreement between the landlord and the *putnidar* entered into while the Embankment Acts (XXXII of 1855 and Beng. Act, VII of 1866) were in force ,that the *putnidar* was to be exempt from all charges to which the term *poolbundi* could be reasonably applied, is operative even after those Acts were superseded by the Bengal Embankment Act of 1882. There is nothing in the Act of 1882 to render such an agreement contrary to the policy of the law or void for any other reason. The *putnidar* is entitled to come to Court for the purpose of having his contractual rights vindicated as soon as he has reason to apprehend the breach of the contract on which he relies. SHIBA PROSAD SAMANTA *v.* RAKHALMANI DASEE (1913) **I. L. R. 41 Calc. 130**

ENCROACHMENT.

See BOMBAY DISTRICT MUNICIPAL ACT (III OF 1901), SS. 113, 122. **I. L. R. 38 Bom. 15**

ENCUMBRANCE.

See GUARDIANS AND WARDS ACT (VIII OF 1890), SS. 7(2), 29, 30. **I. L. R. 37 Mad. 38**

——— **discharge of—**

See MADRAS REVENUE RECOVERY ACT (II OF 1864), SS. 1, 42. **I. L. R. 37 Mad. 49**

ENDORSEE.

See RAILWAY RECEIPT. **I. L. R. 38 Bom. 659**

ENDOWMENT.

See HINDU LAW—ENDOWMENT.

ENHANCEMENT OF SENTENCE.

See CRIMINAL PROCEDURE CODE, S. 423. **I. L. R. 36 All. 485**

EQUITABLE ESTOPPEL.

See ESTOPPEL BY JUDGMENT. **I. L. R. 37 Mad. 270**

EQUITABLE MORTGAGE.

See TRANSFER OF PROPERTY ACT (IV OF 1882), S. 59 . **I. L. R. 38 Bom. 372**

EQUITABLE SET-OFF.

——— *Order disallowing plea before remand, if may be reviewed at final hearing. Held*, that in the circumstances of the case the Court of the Judicial Commissioner was right in allowing the defendant's plea of equitable set-off at the final hearing after a remand it had ordered for certain inquiries, although at the previous hearing it had upheld the decision of the lower Court rejecting the plea. SHEO NARAIN SINGH *v.* BISHUNATH SINGH (1913) . . **18 C. W. N. 426**

EQUITY, JUSTICE AND GOOD CONSCIENCE.

——— **rule of—**

See HINDU LAW—MAINTENANCE. **I. L. R. 37 Mad. 397**

ESCAPE FROM CUSTODY.

See ARREST BY PRIVATE PERSON. **I. L. R. 41 Calc. 17**

ESTATES LAND ACT.

——— **whether, retrospective—**

See MADRAS ESTATES LAND ACT, SS. 3 (7), 6 . . . **I. L. R. 37 Mad. 1**

ESTATE OF DECEASED PERSON.

——— **liability of—**

See MAINTENANCE. **I. L. R. 41 Calc. 88**

ESTOPPEL.

See ADMINISTRATOR PENDENTE LITE **I. L. R. 41 Calc. 771**

See ADVERSE POSSESSION. **I. L. R. 37 Mad. 373**

ESTOPPEL—*concld.*

See COMPANIES ACT (VI OF 1882), SS. 76, 77 . . **I. L. R. 36 All. 416**

See ESTOPPEL BY JUDGMENT.

See HINDU LAW—ADOPTION. **I. L. R. 37 Mad. 529**

See HINDU LAW—PARTITION. **L. R. 41 I. A. 247**

See MORTGAGE . **I. L. R. 36 All. 141**

See RES JUDICATA. **I. L. R. 41 Calc. 69**

1. ——————— *Parties in pari delicto. Held,* that in the case of a contract where both the partes were *in pari delicto* the plaintiff was not entitled to estop the defendant from showing the illegality of his title, nor was there any estoppel against any Act of Parliament or in India against an Act of the Legislature. SHRIDHAR BALKRISHNA *v.* BABAJI MULA (1914) . **I. L. R. 38 Bom. 709**

2. ——————— *Person not in fact misled, if may urge.* The doctrine of estoppel by conduct does not apply in a case in which the party claiming that the other side is bound by the estoppel had express notice of the fact which he says was not represented to him by the other side as the true fact. SARAT CHANDRA MUKHOPADHYAY *v.* RAJENDRA LAL MITRA (1913) **18 C. W. N. 420**

3. ——————— *Assignee of right enjoying it, if can question assignor's right to transfer.* The rule of estoppel which binds landlords and tenants, mortgagors and mortgagees, bailors and bailees, applies to employees and contracting parties generally who cannot accept the benefits of the contract and yet, when called upon to perform their duties under it, repudiate it as made without right or as otherwise wanting in force, provided the contract is not actually in violation of law or wholly void. The assignee or the licensee of any right accepted and acted under is accordingly estopped to deny the authority from which the right proceeds. LAKHAN JENA *v.* ARJUN NAIK (1914) . . . . **18 C. W. N. 1194**

4. ——————— *As between donor and donee—Estoppel in favour of executor or legatee as against testator.* The doctrine of estoppel cannot be applied as between donor and donee in every case. There is no estoppel in favour of the executor or legatee as against the testator. There is no estoppel in favour of the executor or the legatee as against the heir-at-law of an occupancy raiyat so as to deprive him of what he is entitled to take by statute. AMULYA RATAN SIRKAR *v.* TARINI NATH DEY (1914) . . . **18 C. W. N. 1290**

ESTOPPEL BY JUDGMENT.

——————— *Equitable estoppel—Res judicata—Indemnity, contract of—Breach—Decree against promisee is binding on promisor.* The second defendant undertook to pay interest on certain debt of the plaintiff, and in default, agreed to indemnify the plaintiff against all losses caused thereby. The second defendant having defaulted, the

ESTOPPEL BY JUDGMENT—*concld.*

creditor recovered judgment both for principal and interest on the debts, in a suit to which the plaintiff and second defendant were parties, the court finding that second defendant's plea of payment of interest was false. In a suit by the plaintiff for recovery of damages against the second defendant, on account of the latter's default in payment of the stipulated interest, the second defendant again pleaded payment. *Held,* that whether the technical rule of *res judicata* was applicable or not, the second defendant was equitably estopped, by reason of the finding in the previous suit from raising the contention that he had really paid the interest due to the creditor. Where there is a contract to indemnify, a decree passed against the promisee cannot be impeached by the promisor and if both the promisee and the promisor were parties to the suit by the third party, or if the promisor had notice of the suit, the judgment would be conclusive against the promisor. The contract on the part of the promisor is substantially broken when the Court finds in a suit honestly defended by the promise, that there has been a violation of duty by the promisor, which has entitled a third party to the damage for which the indemnity has been given. *Parker* v. *Lewis, L. R. 8 Ch. A. 1035, 1058, Mercantile Investment and General Trust Company* v. *River Plate Trust Loan, and Agency Company, [1894] 1 Ch. 578,* and *Krishnan Nambiar* v. *Kannan, I. L. R. 21 Mad. 8,* referred to. NALLAPPA *v.* VRIDHACHALA (1914) **I. L. R. 37 Mad. 270**

EVIDENCE.

See ADMISSION AND CONFESSIONS TO POLICE OFFICERS. **I. L. R. 41 Calc. 601**

See CIVIL PROCEDURE CODE (1908), O. XLI, r. 27. . **I. L. R. 38 Bom. 665**

See CONSTRUCTION OF DOCUMENT. **I. L. R. 37 Mad. 480**

See CONTEMPT OF COURT. **I. L. R. 41 Calc. 173**

See EVIDENCE ACT.

See EVIDENCE ACT (I OF 1872), S. 35. **I. L. R. 36 All. 161**

See EVIDENCE ACT (I OF 1872), S. 91. **I. L. R. 36 All. 222, 259**

See EVIDENCE ACT (I OF 1872), S. 92, PROV. (1) . **I. L. R. 36 All. 537**

See GUARDIANS AND WARDS ACT (VIII OF 1890), CH. II . **I. L. R. 36 All. 282**

See KABULIYAT. **I. L. R. 41 Calc. 342, 493**

See LAND ACQUISITION. **I. L. R. 41 Calc. 967**

See MAHOMEDAN LAW—DIVORCE. **I. L. R. 36 All. 458**

See PENAL CODE (ACT XLV OF 1860), S. 468 . . **I. L. R. 36 All. 1**

EVIDENCE—*concld.*

See PRE-EMPTION.
I. L. R. 36 All. 464, 471

See SECURITY FOR GOOD BEHAVIOUR.
I. L. R. 41 Calc. 806

——— **additional**—

See WILL . **I. L. R. 36 All. 93**

——— *Handwriting, comparison of—Admissibility of intercepted letter written by the accused relating to the importation of contraband cocaine, the subject of the charge—Admissibility of intercepted letters addressed to the accused in order to prove identity with the sender of a telegram relevant to the charge—"Import into Bengal," meaning of—Seizure of cocaine in the Custom House before clearance—Evidence Act (I of 1872), s. 11—Bengal Excise Act (Ben. V of 1909), ss. 2 (12), 46 (a) and 61.* A letter written by an accused, when self-disserving, is *primâ facie* evidence against him if it relates distinctly to a relevant point. It is not necessary that it should be signed; it is enough if it is traced to the writer, and it is admissible though it may have been intercepted or surreptitiously detained and opened. *Rex* v. *Derrington, 2 C. & P. 418,* referred to. An unsigned letter, proved to have been written by the accused addressed to a firm in London, which had shipped certain contraband cocaine which the accused was charged with importing into Bengal, is admissible in evidence, though intercepted under the order of the Magistrate at the Post Office during the course of transit. A letter written by the exporter of certain contraband cocaine, the subject of the charge against the accused, containing a reference to a telegram signed in a different name but bearing the same business address as that of the accused, is relevant under s. 11 of the Evidence Act as showing that the accused was the sender of the telegram, though the letter was intercepted at the Post Office under an order of the Magistrate before delivery. *Queen* v. *Cooper, 1 Q. B. D. 19,* approved. Although an excisable article may be actually within the geographical limits of Bengal, it cannot be said to have been brought into Bengal, within the meaning of s. 2 (*12*) of the Bengal Excise Act if it is intercepted at the Custom House, and the offence in such a case is not one of importing but of attempting to import under s. 61 of the Act read with s. 46(*a*). BOOTH *v.* EMPEROR (1913)
I. L. R. 41 Calc. 545

EVIDENCE ACT (I OF 1872).

——— **ss. 4 and 90**—*Ancient document—Practice as to mode of proof—Whether document presumed to be genuine by the First Court can be rejected in appeal—Practice—Appeal, from preliminary decree after passing of final decree.* According to the practice prevailing in this Presidency when *primâ facie* evidence of custody and of the date of a document purporting to be 30 years old is given, the Court generally marks the document on the footing that there is sufficient evidence to justify its being marked as an exhibit at that stage. It is only subsequently that the opponent exercises his right of adducing evidence of circumstances which entitle him to say that the presumption under s. 90 of the Evidence Act should not be drawn with respect to the document. The Court generally arrives at its conclusion on the matter after the evidence on both sides has been given. An Appellate Court is entitled to reject a document presumed to be genuine by the Original Court under s. 90 of the Evidence Act, without calling for further proof. *Shafiq-un-nissa* v. *Shaban Ali Khan, I. L. R. 26 All. 581,* and *Srinath Patra* v. *Kuloda Prosad Banerjee, 2 C. L. J. 592,* refererd to. It is competent to a party to prefer an appeal against the preliminary decree in a redemption suit, though before the appeal is presented the final decree has been passed. *Lakshmi* v. *Mani Devi, 21 Mad. L. J. 1063,* followed. *Janaki Nath Ray Chowdhury* v. *Promotha Nath Ray Chowdhury, 15 C.W. N. 830,* referred to. RAMUVIEN *v.* VEERAPPUDAYAN (1914) . . . . **I. L. R. 37 Mad. 455**

EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 4, 90**—*concld.*

——— **s. 11.**

See EVIDENCE . **I. L. R. 41 Calc. 545**

——— **s. 18**—*Admission by natural guardian of minor, if evidence against him in respect of interest not derived from guardian.* In a suit by Hindu reversioners for recovery of immoveable property left by their maternal grandfather and sold by their maternal grandmother for alleged necessity, the purchaser's representative adduced oral evidence to show that the widow had sold it for her husband's debts. This evidence was found by the trial Judge to be unreliable but the learned Judge, adverting to documentary evidence, chiefly relied on an affidavit which was filed in another suit and was signed by the reversioners' mothers and fathers and which contained a statement to the effect that certain other premises had been mortgaged by the widow (grandmother) for her husband's debt and that her daughters and sons-in-law had joined for protecting the reversioners' (the present plaintiffs') interest, and the Judge held that the affidavit was admissible, regarding "the parents as the guardians of the plaintiffs and as capable of making admissions against their interest on their behalf:" *Held* (on appeal), *per* JENKINS, *C. J.*, and WOODROFFE, *J.*, and affirmed by the Judicial Committee of the Privy Council, that there is nothing in the Indian Evidence Act to support the view of the learned Judge or make the affidavit relevant. That the present plaintiffs had in no sense derived their interest in the subject-matter of the suit from their parents, nor could their parents be regarded as having been expressly or impliedly authorised by them to make the admission. That when the suit was brought long after the alienation but within the period of limitation and the delay was explained as being due to the pendency of another suit and also to want of means: *Held*, that the delay did not operate to the prejudice of

EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 18**—*concld.*

the plaintiffs' suit for declaration and possession. MANOKARANI DEBI *v.* HARIPADA MITTER (1914) **18 C. W. N. 718**

——— **ss. 25, 33**—

See ADMISSIONS AND CONFESSIONS TO POLICE OFFICERS.

I. L. R. 41 Calc. 601

——— **s. 30**—*Co-accused—Confession—Independent corroboration—Evidence—Practice.* Eleven accused persons were tried for the offence of dacoity. There was no direct evidence against any of them. Seven of these confessed, each one implicating himself and the rest. They were convicted on their own confessions. A question arose whether the remaining four accused, who had not confessed, could be convicted solely on the confessions of their co-accused when they were not corroborated by any independent evidence. HEATON, *J.*, was of opinion that section 30 of the Evidence Act made the confessions, which were already evidence in the case, evidence against the person implicated as well as the other accused. SHAH, *J.*, held that section 30 permitted the confession of a co-accused to be taken into consideration along with other evidence in the case; but if there was no evidence in the case outside those statements, no conviction based only upon the confessions of co-accused was good in law. Owing to this difference in opinion, the case was referred to MACLEOD, *J.* *Held*, that there was nothing in s. 30 of the Indian Evidence Act, 1872, which prevented the Court from convicting after taking the confession of a co-accused into consideration; but that the High Courts in India had laid down a rule of practice which had all the reverence of law, that a conviction founded solely on the confession of a co-accused could not be sustained. *Held*, further, that the confession of one co-accused could not be said to be corroborated by the confession of other co-accused. *Per* MACLEOD, *J.*—I do not think that "confession" in section 30 can be restricted to an unretracted confession, as once a confession is proved it may be taken into consideration. EMPEROR *v.* GANGAPPA KARDEPPA (1913)

I. L. R. 38 Bom. 156

——— **s. 32**—*Custom, statements of deceased persons as to existence of, if admissible, when made after controversy arisen.* Evidence, oral or documentary, as to statements of a deceased person as to the custom in a family, is not admissible, if it appears that such statements were made after a controversy as to the custom had arisen. EKRADESHWAR SINGH *v.* JANESWARI BAHUASIN (1914) . . . . . **18 C. W. N. 1249**

——— **s. 33**—*Mortgage-bond—Denial of execution, refusal of registration—Examination of attesting witnesses by the Registrar—Compulsory registration—Death of attesting witnesses—Suit on mortgage—Evidence recorded by registrar if admissible under s. 33, Evidence Act—Special Registrar or Sub-Registrar at Headquarters, powers of.* A mortgage-bond was presented for registration by the mortgagee before the Special Registrar. The executant denied execution and the Special Registrar, acting for the Registrar, refused registration but after making an enquiry during which he examined the attesting witnesses registered the document. Subsequently, the mortgagee brought a suit on the mortgage, but during the interval the attesting witnesses, all but one, had died and the depositions recorded during the registration enquiry were tendered as evidence: *Held*, that the evidence given by the deceased attesting witnesses, who were duly cross-examined before the Special Registrar, was relevant and admissible in the present suit under s. 33 of the Evidence Act. JEHETO SHEIKH *v.* JAIBANNESSA BIBEE (1913). . **18 C. W. N. 605**

EVIDENCE ACT (I of 1872)—*contd.*

——— **s. 33**—*concld.*

——— **s. 35**—*Evidence—Public document—Report made by kotwal in 1840, on reference by the Political Agent.* *Held*, that on the question of the ownership of a certain temple said to be the property of the Ajaigarh State, the report of a kotwal, who in 1840 had made an inquiry into the ownership of the temple at the instance of the Political Agent, was relevent evidence as being a public record of a public inquiry. BALDEO DAS *v.* GOBIND DAS (1914) . . . **I. L. R. 36 All. 161**

——— **ss. 40, 41, 42 and 44**—*Probate Act (V of 1881), s. 59—Will—Probate—Suit by the executor to recover possession and rent—Plea that the will was a fabrication and that probate had been obtained by fraud—Previous unsuccessful application by defendant to District Court to revoke probate on the same grounds, effect of—Jurisdiction of the Subordinate Judge to entertain the plea—Competency of the Probate Court, namely, the District Court.* An executor applied for the grant of probate and the Probate Court, namely, the District Court, made the grant. Subsequently a nephew of the testator made an application to the Court for the revocation of the probate on the ground that the will was a forgery and that he had been prepared to prove it in the proceeding, but at the last moment the executor had bought him off under a mutual arrangement, but after the order for probate had been made, the executor failed to perform his part of the arrangement and had thus committed a fraud both on the Court and the applicant. The application for revocation was disposed of by the Court on the ground that the applicant, on his own showing, was a party to a fraud upon the Court, that he had not come with clean hands and was not, therefore, entitled to the relief sought. Thereafter the executor having brought a suit in the Court of the Subordinate Judge to recover rent and possession against a tenant of the testator as defendant 1 and against the aforesaid nephew as defendant 2, defendant 1 pleaded that the deceased (testator) had asked him to pay rent to defendant 2 and defendant 2 contended, as in the previous proceedings, that the deceased had made no will, that the will produced was a fabrication and that

EVIDENCE ACT (I OF 1872)—*contd.*

— — — **s. 40**—*concld.*

probate had been obtained by fraud. *Held*, that defendant 2 was barred by the decision of the District Court in the revocation proceeding from raising the same question in the Court of the Subordinate Judge. *Held*, further, that it was the District Court which was competent to decide the question of fraud and collusion vitiating the decree of that Court under which probate had been granted, and that as the Subordinate Judge who tried the suit had no jurisdiction in probate matters, the title of the plaintiff was conclusively proved on the production of probate and it was no valid defence for the defendants to allege that the will was a forgery and that probate had been obtained by fraud and deception. *Quære:* Whether a debtor of the estate could raise such a defence if sued by the executor in a Court having jurisdiction to revoke the probate? KISHORBHAI REVADAS *v.* RANCHODIA DHULIA (1914) . . **I. L. R. 38 Bom. 427**

— — — **s. 41**—*Probate and Administration Act (V of 1881), s. 83—Civil Procedure Code (Act V of 1908), s. 11—Contentious proceeding for probate—Will not proved—Probate refused—Suit for recovery of property from defendants who held as executors—Judgment in the probate proceeding refusing probate, not judgment in rem—Res judicata.* In a contentious proceeding for probate, the will produced by the applicants was held not proved and the probate was refused. The applicants appealed to the High Court which dismissed the appeal. The widow of the deceased thereupon brought a suit for the recovery of the property of the deceased from the defendants who held it as executors under the will and the first Court allowed the claim. On appeal by the defendants, two questions having arisen, namely, (i) whether the judgment refusing probate was as much within the scope and intention of s. 41 of the Evidence Act (I of 1872) as a judgment granting probate, and (ii) whether the judgment in the probate proceeding operated as *res judicata*. *Held* by the Full Bench, that s. 41 of the Evidence Act (I of 1872) was not applicable to the judgment of the Appellate Court refusing probate. *Held*, further, that the judgment in the probate proceeding operated as *res judicata* between the parties under s. 83 of the Probate and Administration Act (V of 1881) and s. 11 of the Civil Procedure Code (Act V of 1908). KALYANCHAND LALCHAND *v.* SITABAI (1913) . . **I. L. R. 38 Bom. 309**

— — — **s. 44**—

See FRAUD . **I. L. R. 41 Calc. 990**

— — — — **s. 74**—*Notice under s. 107, Criminal Procedure Code, if a public document—Proof necessary for admission of such document in evidence.* A notice under s. 107, Criminal Procedure Code, is a public document within the meaning of s. 74 of the Evidence Act, but it cannot come in without proof that the parties mentioned in it are the parties concerned in the question at issue about which it is produced as evidence. AMJAD *v.* LACHMI KANTA JHA (1914) . . . **18 C. W. N. 644**

EVIDENCE ACT (I OF 1872)—*contd.*

— — — — **s. 91**—

1. — — — — — — — *Evidence—Confession—Admission of guilt during departmental inquiry—Oral evidence as to statement admissible.* The complainant in a petty criminal case before a bench of Honorary Magistrates, in the course of negotiations concerning a compromise, made a statement to the effect that he had paid a certain sum of money by way of an illegal gratification to the peshkar of the Court. The peshkar was at once called up and examined, by way of departmental inquiry and not on oath, and he admitted having received money from the complainant. The Honorary Magistrates reported the circumstances to the District Magistrate, who directed the prosecution of the peshkar. *Held*, that the statement made by the peshkar to the Magistrates was not a statement which was required by law to be in writing and could be proved by the evidence of either of the Magistrates who had heard it. EMPEROR *v.* HAIDAR RAZA (1914) . . . **I. L. R. 36 All. 222**

2. — — — — — — — — — *Hundi—Renewal of hundis given as security for debt—Hundis sued on inadmissible for want of proper stamp—Right of creditor to fall back on previous hundis.* The defendants borrowed money from the plaintiffs and in return therefor drew four *hundis* in their favour As these *hundis* became due, the interest on the loan was paid and the *hundis* were renewed, the old *hundis* being on each occasion handed over to the defendants. Ultimately the plaintiffs sued on a set of renewed *hundis*, but it was found that these particular *hundis* were insufficiently stamped and could not be admitted in evidence. *Held*, that the plaintiffs were entitled to fall back upon the last preceding set of *hundis*, and, as these were in the possession of the defendants, to give secondary evidence of their contents. JAGAN PRASAD *v.* INDAR MAL (1914) . . **I. L. R. 36 All. 259**

— — — — **s. 92**—

See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), SS. 2 (2), 10A.
I. L. R. 38 Bom. 18

See RENT . . **I. L. R. 41 Calc. 347**

See TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 54, 118.
I. L. R. 37 Mad. 423

— — — — — — — — — — *Evidence to disprove area stated in lease of land within specified boundaries—Admissibility—Evidence of previous negotiations, if admissible.* Where the area of demised land, which was described in the lease as lying within certain specified boundaries, was stated therein as 400 bighas, extrinsic evidence was not admissible to show that there was not the stated area within the specified boundaries. Extrinsic evidence as to the negotiations which led up to the contract was inadmissible to vary the construction of the lease. DURGA PROSAD SINGH *v.* RAJENDRA NARAIN BAGCHI (1913) . . . **18 C. W. N. 66**

EVIDENCE ACT (I OF 1872)—*concld.*

———— **s. 92, prov. (1)**—*Evidence—Consideration—Admissibility of evidence to prove that the true consideration is other than that which appears from the deed embodying the transaction.* If one party to a deed alleges and proves that the whole of the consideration the receipt of which was acknowledged in the deed did not pass, the case falls within the first proviso to s. 92 of the Indian Evidence Act, 1872, and the other party is at liberty to prove what the real consideration was. Evidence can be given to prove the real nature of the transaction. *Hanif-un-nissa* v. *Faiz-un-nissa, I. L. R. 33 All. 340,* followed. *Jumna Dass* v. *Srinath Roy, I. L. R. 17 Calc. 176* (note), *Shah Mukhun Lall* v. *Baboo Sree Kishen Sing, 12 Moo. I. A. 157, Lalu Himmat Sahai Singh* v. *Llewhellen, I. L. R. 11 Calc. 486, Hukumchand* v. *Hiralal, I. L. R. 3 Bom. 159, Indarjit* v. *Lal Chand, I. L. R. 18 All. 168, Kailash Chandra Neogi* v. *Harish Chandra Biswas, 5 C. W. N. 158, Nathu Khan* v. *Sewak Koeri, 15 C. W. N. 408, Muhammad Yusuf* v. *Muhammad Musa, All. Weekly Notes, (1907) 181,* and *Adityam Iyer* v. *Ramakrishna Aiyar, 25 Mad. L. J., 602,* refererd to. CHUNNI BIBI *v.* BASANTI BIBI (1914) **I. L. R. 36 All. 537**

———— **s. 106**—

See MUNICIPALITY. **I. L. R. 41 Calc. 168**

———— **ss. 107, 108**—*Nature of presumption—Adverse possession, tacking of.* There is no presumption in law that a person was alive for seven years from the time when he was last heard of. Ss. 107 and 108 of the Evidence Act deal with the procedure to be followed when a question is raised before a Court, as to whether a person is alive or dead, but do not lay down any presumption as to how long a man was alive or at what time he died. *Narki* v. *Lal Sahu, I. L. R. 37 Calc. 103,* and *Muhammad Sharif* v. *Bande Ali, I. L. R. 34 All. 36,* followed. Assuming that the Court could make a presumption that a person was alive for seven years after he was last heard of, it depends on the circumstances of each case, whether the Court would draw such a presumption or not. A person in possession without title cannot tack his possession to that of another, if he did not enter on possession as the heir of that other. VEERAMMA *v.* CHENNA REDDI (1914) . **I. L. R. 37 Mad. 440**

s. 115—

See ADMINISTRATOR PENDENTE LITE. **I. L. R. 41 Calc. 771**

———— **s. 118**—

See APPEAL . **I. L. R. 41 Calc. 406**

EVIDENCE OF IDENTITY.

See CONSPIRACY . **I. L. R. 41 Calc. 754**

EXCISE.

———— *"Denatured spirit" meaning of—Dilution of denatured spirit with water rendering it fit for human consumption—"Excisable article" and "liquor," whether diluted denatured spirit is—"Manufacture," meaning of—Mere dilution of denatured spirit not a "process"—Bengal Excise Act (Beng. V of 1909), ss. 2 (6), (7) (14) (15), 46, 48, 75, 81, 84—Application of the Criminal Procedure Code to trials for excise offences—Misjoinder of charges—Criminal Procedure Code (Act V of 1898), s. 233.* The words "effectually and permanently rendered unfit" in s.2 (6), read with s. 48, of the Bengal Excise Act, appear to contemplate such a process of denaturing as will defy any chemical treatment which, while not substantially increasing the bulk of the liquid, renders the spirit fit for human consumption. Where the liquid was so manipulated as to lose its characteristics of a denatured spirit, and the accused had succeeded in the attempt to render the spirit fit for human consumption, the conviction under s. 48 was *held* bad in the above mearing. *Semble:* If the words imply only a process which would be permanently effective in the absence of some chemical treatment or process of filtration, the conviction under s. 48 was still bad for want of evidence that the spirit was in fact ever so denatured by the accused. The words "unfit for human consumption" may be taken to mean "liable to be injurious to health." The term "manufacture" in s. 2 (*11*) of the Act does not include the act of mere dilution of denatured spirit with water, but a continuous and regular action or a succession of actions taking place or carried on in a definite manner and leading to the accomplishment of some result. *Quære:* Whether denatured spirit diluted with water is an "excisable article" or "liquor," within s. 2 (7) and (*14*) of the Act. Ss. 75 and 81 of the Act apply to proceedings before a Collector, and s. 84 shows that the Criminal Procedure Code is applicable to trials before a Magistrate under the Act subject to specified restrictions. An appeal, therefore, lies under s. 410 of the Code, from a conviction and sentence by a Presidency Magistrate, passed under the Act. The acts of manufacturing the excisable article brought into Court, bottling, and possessing the same, and of selling from time to time various other and similar articles not before the Court, and of attempting to render denatured spirit fit for human consumption, do not constitute the same transaction, and a trial in respect of all such acts is bad for misjoinder, under s. 233 of the Code. S. 233 applies to trials of summons cases. *King-Emperor* v. *San Dun, 3 L. B. R. 52,* approved. UPENDRA NATH BISWAS *v.* EMPEROR (1913) **I. L. R. 41 Calc. 694**

EXCULPATORY STATEMENTS.

See ADMISSIONS AND CONFESSIONS TO POLICE OFFICERS. **I. L. R. 41 Calc. 601**

EXECUTION.

———— ———— *Step in aid of—Accompanying serving peon and identifying the judgment-debtor, if a step in aid of execution—Limitation Act,*

EXECUTION—*concld.*

(IX of 1908), Article 182, cls. (5) and (6)—Court deciding ex parte and without notice to judgment-debtor—Application within time—Decision if binds judgment-debtor—Ex parte decree. One of the decree-holders accompanying the serving peon and identifying the judgment-debtor upon whom notice of the application for execution had been taken out for service, does not by itself constitute a step taken by the decree-holders in aid of execution within cls. (5) and (6) of Art. 182 of the Limitation Act. Where an application for execution which was reported by the office of the executing Court to be time-barred was, without notice to the judgment-debtor, held by the Court to be within time, and registered and later on dismissed for default: *Held*, that the decision that the application was not time-barred was not binding on the judgment-debtor. An *ex parte* decree is a good decree, but if it is made in the absence of, and without notice to, the other party, it does not bind him, and does not prevent him from showing what the true facts of the case were. JUGOL KISHORE *v.* CHINTAMONEY (1914) . . . **18 C. W. N. 1288**

EXECUTION APPLICATION.

See CIVIL PROCEDURE CODE (ACT V OF 1908), SS. 38, 39, 41 AND 50, O. XXI, RR. 16, 26 . **I. L. R. 37 Mad. 231**

EXECUTION OF DECREE.

See CIVIL COURTS ACT (XIV OF 1869), S. 32 . . **I. L. R. 38 Bom. 662**

See CIVIL PROCEDURE CODE (1882), SS. 268, 278, 283 . **I. L. R. 38 Bom. 631**

See CIVIL PROCEDURE CODE (1908), S. 60, CL. 2 (*b*) . . **I. L. R. 38 Bom. 667**

See CIVIL PROCEDURE CODE (1908), SS. 68, 70, R. 14; O. XXI, R. 101. **I. L. R. 38 Bom. 673**

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, R. 7. **I. L. R. 38 Bom. 194**

See CIVIL PROCEDURE CODE (1908), O. XXI, RR. 35, 95 AND 96. **I. L. R. 36 All. 181**

See CIVIL PROCEDURE CODE (1908), O. XXXVIII, R. 5. **I. L. R. 38 Bom. 105**

See CRIMINAL PROCEDURE CODE, SS. 373, 375A . . **I. L. R. 36 All. 172**

See JURISDICTION. **I. L. R. 41 Calc. 915**

See LANDLORD AND TENANT. **I. L. R. 41 Calc. 926**

See LIMITATION ACT (XV OF 1877), S. 4; SCH. II, ART. 179 (2). **I. L. R. 36 All. 284**

See LIMITATION ACT (IX OF 1908), S. 15. **I. L. R. 38 Bom. 153**

EXECUTION OF DECREE—*contd.*

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 182 . **I. L. R. 36 All. 439**

See MORTGAGE . **I. L. R. 38 Bom. 24**

See PRE-EMPTION. **I. L. R. 36 All. 398**

——— **jurisdiction—**

See CIVIL PROCEDURE CODE (ACT V OF 1908), SS. 37, 38 AND 150. **I. L. R. 37 Mad. 462**

1. ——— *Judgment-debtor, death of—Insolvency—Civil Procedure Code (Act V of 1908), s. 55 (4)—Surety, discharge of.* A judgment-debtor having, under s. 55 (4) of the Code of Civil Procedure, found a surety that he would apply to be declared an insolvent within a specified time, and would appear when called upon, died before the expiration of such time: *Held*, that the surety was discharged by the death of the judgment-debtor, and it was not open to the decree-holder to proceed against him. *Kishan Nayar* v. *Ittinan Nayar, I. L. R. 24 Mad. 637*, followed. NABIN CHANDRA HAZARI *v.* MIRTUNJOY BARICK (1913) **I. L. R. 41 Calc. 50**

2. ——— *Sale in execution—Grove or garden with house being ancestral property and forming part of a mahal—Sale by Civil Court amin—Jurisdction—General rules (Civil) of 1911, Chapter IV, rules 5 and 8. Held* that a grove or garden, part of which was occupied by a house, and which was a part of a mahal and assesseed to revenue and had been owned continously by the family of the proprietors for over fifty years, was ancestral land within the meaning of r. 5 of Chap. IV of the General Rules for the Civil Courts and could not be sold by the Court amin in execution of a Civil Court decree, but only through the Collector after the decree had been transferred to him for execution. FATMATUL KUBRA *v.* ACHCHI BEGAM (1913) . . . **I. L. R. 36 All. 33**

3. ——— *Limitation—Limitation Act (IX of 1908), Sch. I, Art. 182—Application in accordance with law—Judgment-debtor missing.* A decree for sale on a mortgage executed by *A* was passed against *A* (who was reported to be missing at the time) and against *B*, *C*, *D*, and *E* who were in possession of the mortgaged property and were heirs presumptive of *A* jointly. *Held*, that in the absence of any evidence that *A* was dead, an application for execution of this decree against *A* alone was an application in accordance with law within the meaning of Art. 182 of the First Schedule of the Limitation Act, 1908. MUHAMMAD HUSAIN *v.* INAYAT HUSAIN (1914) **I. L. R. 36 All. 482**

4. ——— *Sale in execution—Failure of judgment-debtor's title—suit for refund of purchase money—Procedure.* Where an auction purchaser seeks to have refunded the price paid by him for property sold in execution of a decree on the ground that at the time of sale the judgment-debtor had no saleable interest therein it is com-

EXECUTION OF DECREE—*concld.*

petent to him to proceed by way of a regular suit, and he is not confined to the special remedy provided by the Code of Civil Procedure. *Munna Singh* v. *Gajadhar Singh, I. L. R. 5 All. 577*, followed, but doubted: *Kishun Lal* v. *Muhammad Safdar Ali Khan, I. L. R. 13 All. 383, Sidheswari Prasad Narin Singh* v. *Gosain Mayanand, I. L. R. 35 All. 419; 11 All. L. J. 606*, and *Dorab Ali* v. *Abdul Aziz, L. R. 5 I. A. 126*, referred to. MUHAMMAD NAJIB-ULLAH *v.* JAI NARAIN (1914)
I. L. R. 36 All. 529

EXECUTION PROCEEDINGS.

See CIVIL PROCEDURE CODE (1908), SS. 37, 38 AND 150.
I. L. R. 37 Mad. 462

See RES JUDICATA.
I. L. R. 37 Mad. 314

——— res judicata in—

See CIVIL PROCEDURE CODE (1908), SS. 37, 38 AND 150.
I. L. R. 37 Mad 462

1. ——— *Civil Procedure Code (Act V of 1908), s. 141 and O. IX, r. 13.* O. IX, r. 13, of the Civil Procedure Code, 1908, is not applicable to a proceeding under rr. 100 and 101 of O. XXI of that Code. *Thakur Prasad* v. *Fakirullah, I. L. R. 17 All. 106*, referred to. HARI CHARAN GHOSE *v.* MANMATHA NATH SEN (1913)
I. L. R. 41 Calc. 1

2. ——— *Execution proceedings arrested by injunction of Court—Case dismissed, attachment subsisting—Subsequent application, if continuation of former application —Prayer for execution by attachment and sale of land—Subsequent application for attachment and sale of movables, if abandonment of relief claimed in first application—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 6—Limitation.* The appellant obtained an *ex parte* decree for rent against the defendant on the 16th July 1906. After an unsuccessful application by the judgment-debtor under s. 108, Civil Procedure Code, to have the *ex parte* decree set aside, the decree-holder applied on the 13th February 1907 for attachment and sale of specified lands. The judgment-debtor applied on the 6th May 1907 for time to satisfy the decree. The judgment-debtor instituted a suit to have the decree set aside on the ground of fraud and obtained on the 27th June 1907 an injunction restraining the decree-holder from further executing the decree and the Court recorded an order to the effect "that the case be dismissed, attachment subsisting; the injunction was subsequently dissolved on 8th May 1908. On 18th October 1909, the decree-holder made a second application for execution by attachment and sale of movables. To this the judgment-debtor objected on the 16th December that the execution was barred by limitation. The objection was overruled on 9th June 1910 and the decree-holder was called upon to take further steps but as the writ of attachment was returned unserved on the 18th

EXECUTION PROCEEDINGS—*concld.*

June 1910, the case was dismissed for default and want of prosecution. On 4th July 1910, a third application was made for execution by attachment and sale of the identical lands mentioned in the first application of the 13th February 1907: *Held*, that the application for execution of the 4th July 1910 was not barred by limitation under Art. 6, Sch. III of the Bengal Tenancy Act, as the second application of 18th October 1909 could not rightly be treated as an abandonment of the relief claimed in the first application but was an application for additional relief, and the third application of the 4th July 1910 was in substance an application in continuation of the first application, the proceedings wherein were discontinued by reason of the injunction obtained by the judgment-debtor. SARANDHARI LAL *v.* BIKRAM SINGH (1913)
18 C. W. N. 539

EXECUTION SALE.

See INSOLVENCY . **L. R. 41 I. A. 251**

EXECUTIVE AND JUDICIAL FUNCTIONS.

See FORFEITURE.
I. L. R. 41 Calc. 466

EXECUTOR.

See WILL . . . **I. L. R. 36 All. 217**

——— conveyance by—

See VENDOR AND PURCHASER.
L. R. 41 I. A. 189

——— title of, to sue without probate—

See LIMITATION ACT (IX OF 1908), s. 17.
I. L. R. 37 Mad. 175

EX PARTE DECREE.

See DECREE, *ex parte.*

1. ——— *Appearance, what constitutes—Civil Procedure Code (Act V of 1908), O. IX, rr. 6, 13; O. XVII, rr. 2, 3—Part-heard suit—Adjourned hearing—Absence of defendant—Practice.* The provisions of O. IX by themselves do not apply to a case in which the defendant has already appeared in answer to the summons but has failed to appear at an adjourned hearing of the suit. For such a case the procedure is laid down in O. XVII which deals with adjournments. The distinction between rr. 2 and 3 of O. XVII is that while the former rule applies to hearings adjourned at the instance of the Court, the latter applies to hearings adjourned at the instance of a party to whom time has been allowed to do some act to further the progress of the suit but who has defaulted. There is yet another distinction between the two rules. Where there are no materials on the record, the proper procedure to follow would be that laid down in r. 2 but if there are materials on the record the Court ought to proceed under r. 3. To apply the procedure, therefore, laid down in r. 3 to a case there must be the presence of both the elements; *viz.*, (i) the adjournment must have been at the instance of a party; and (ii) there

EX PARTE DECREE—*concld.*

must be materials on the record for the Court to proceed to decide the suit. The presence of one without the other does not justify the application of r. 3. *Kader Khan* v. *Juggeswar Prasad Singh, I. L. R. 35 Calc. 1023, Mariannissa* v. *Ramkalpa Gorain, I. L. R. 34 Calc. 235,* and *Jonardan Dubey* v. *Ramdhone Singh, I. L. R. 23 Calc. 738,* referred to. ENATULLA BASUNIA *v.* JIBAN MOHAN ROY (1914) . . . **I. L. R. 41 Calc. 956**

2. ——————— *perjured evidence. whether a ground for setting aside—Fraud —Plaintiff knowing evidence to be perjured—Court imposed upon.* If the case, which was placed before the Court, was a false one the Court has jurisdiction in a subsequent suit to set aside the decree which was obtained in the previous suit by fraud practised on the Court. *Aboulоff* v. *Oppenheimer, 10 Q. B. D. 295, Vadala* v. *Lawes, 25 Q. B. D. 310, Lakhmi Charan* v. *Nur Ali, I. L. R. 38 Calc. 936 : s. c. 15 C. W. N. 1010,* followed. *Mosuful Huq* v. *Surendra Nath, 16 C. W. N. 1002, Baker* v. *Wordsworth, 67 L. J. R. Q. B. D. 301,* distinguished. KEDAR NATH DAS *v.* HEMANTA KUMARI DEBI (1913) **18 C. W. N. 447**

EXPROPRIETARY TENANT.

See AGRA TENANCY ACT (II OF 1901), s. 10. **I. L. R. 36 All. 155**

——————— *Mortgage of sir land followed by a perpetual lease of the same—Sale of mortgaged property in execution of decree —Rights of auction-purchaser as against perpetual lessee.* Certain *sir* land was mortgaged by the owner, who thereafter, pending a suit for sale on the mortgage, granted a perpetual lease of the mortgaged property. The mortgaged property was sold in execution of a decree for sale on the mortgage, and the auction purchaser sued to eject the perpetual lessee. *Held,* that the auction-purchaser was not entitled to a decree for physical possession as against the lessee, though, if the lease was fraudulent, she was entitled to the rent which the exproprietary tenants ought to pay for the land in suit. GHURA *v.* SHITAB KUNWAR (1914) . **I. L. R. 36 All. 248**

EX-TERRITORIAL JURISDICTION OF BRITISH COURT.

——————— *Foreign Jurisdiction Act, 1890, and China and Corea Order-in-Council, 1894—Arts. III, V, cls. (1), (3), (4), XXXV (2), Order-in-Council—Ex-territorial jurisdiction over foreigners—"British protected person," jurisdiction over—Jurisdiction of Supreme Court of China and Corea to try Afghan soldier enlisted in Indian Army for murder committed at Canton—Consent of Ameer to exercise of jurisdiction, if to be implied from public recruitment of Afghans to the Indian Army—Proof of exercise of ex-territorial jurisdiction in China by oral evidence—Admissibility—English rules of evidence how far binding on Supreme Court at Hong Kong—Statement by accused in answer to question by commanding officer when in custody, if admissible—Substance and not mere formalities of law, to be complied*

EX-TERRITORIAL JURISDICTION OF BRITISH COURT—*contd.*

with—Misdirection to jury on matter of comparatively small importance, if a ground for reversal—Privy Council when will interfere with order in criminal case—Violation of natural justice. The specified conditions under which only, according to cl. (*3*) to Art. V of the China and Corea Order-in-Council, 1904, the Supreme Court of China and Corea has civil and criminal jurisdiction over a "foreigner" as such have no application to "British protected persons" who even when in fact natural born foreigners are "British subjects" as defined by Art. III and so subject to the jurisdiction of that Court under cl. (*1*) to Art. V. The accused, a natural born subject of the Ameer of Afghanistan, was duly enlisted and enrolled in a British Indian regiment, took the oath of allegiance to His Majesty and made a solemn declaration undertaking, among other things, to go wherever ordered by land or sea, and whilst serving with the detachment of that regiment which was encamped on Shameen Island at Canton as a guard of the Concession, was alleged to have murdered a Subadar of that regiment. The Acting Consul at Canton, who also served as Judge under Art. XIX of the Order-in-Council, gave evidence (which was uncontradicted) "that the place of murder was within his jurisdiction and that the jurisdiction exercised at Canon on Shameen was the same ex-territorial jurisdiction as was exercised throughout China by the Supreme Court, that Indian soldiers enjoy His Majesty's protection in Shameen, Canton, and the Court exercises jurisdiction over them, and that consular protection extends to trying persons and protecting them if they are improperly arrested." *Held,* that s. 4 (*1*) of the Foreign Jurisdiction Act, 1890, did not make this evidence inadmissible to prove that by "usage, sufferance or other lawful means" His Majesty has jurisdiction at Canton. That the accused being, during his service in the Indian Army, subject to military law was entitled to His Majesty's protection and was a "British protected person" within Art. III. When the Crown lawfully enlists in its forces aliens along with British subjects and requires of them the same service, loyalty and allegiance as on the duties of British enlisted subjects, it extends to them the same protection in a foreign country where all are serving together in the armed forces of His Majesty. Protection enjoyed by virtue of the Foreign Jurisdiction Act, 1890, "or otherwise," as mentioned in Art. III, includes that derived from other Statutes, Imperial or Indian, applicable to the person in question *Quære:* Whether the Court could take judicial notice of the political change in China in considering the question of jurisdiction. *Quære:* Whether it may not be reasonably inferred from the practice (which is a matter of public knowledge) of enlisting native Afghans in the Indian Army whereby they are *de facto* brought under the authority of His Majesty, that the Ameer does in fact consent to such enlistment with its consequences, so as to bring such enlisted Afghans within the terms of cl. (*4*) Art. V, *i.e.*, "foreigners with respect to whom any State, King, Chief or Government whose

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subjects they are, consents to the exercise of power or authority by His Majesty." The officer commanding the detachment, who spoke to the accused shortly after the occurrence, deposed to having asked the accused why he had done such a senseless act—not thereby meaning to convey a threat or inducement—and to the accused having replied that he was being abused by the deceased three or four days and that without a doubt he had killed him. The Judicial Committee found that the words of the officer though formally a question, were really an exclamation of dismay: *Held*, that the prosecution having by the evidence of this officer proved to the satisfaction of the trial Judge that the statement of the accused was voluntary in the sense that it had not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority, its admission in evidence was not in breach of the long established rule of English Criminal law which makes statements obtained from the accused by pressure of authority and fear of consequences inadmissible in evidence and which casts on the prosecution the onus of proving that the statement relied on was voluntary. On the question whether the statement should not have been excluded from evidence on the ground of its having been made by a person in custody in answer to a question put by a person having authority over him and having custody of of him through his subordinates: *Held*, on a review of English authorities, that the English law on the point was still unsettled, some Judges being of opinion that such a statement is admissible in evidence without exception, whilst others treat its exclusion from evidence as a matter for the Judge's discretion depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case. That the trial Judge in admitting this evidence decided in accordance with what at any rate was a "probable opinion" of the present law if it was not actually the better opinion, and his so doing was not a violation of "the principles of natural justice," calling for His Majesty's interference. That even if the evidence was admissible in the exercise of the trial Judge's discretion, that discretion in the present case was not shown to have been exercised improperly. With reference to Act XXXV (*2*) of the China and Corea Order-in-Council which provides that, subject to the provisions of that order, criminal jurisdiction under the Order shall, as far as circumstances admit, be exercised on the principle of and in conformity with English law for the time being: *Held*, that in the absence of any provision in the Order on the point modifying or excluding the principles and practice of English law, the question of the admissibility of the statement of the accused might justly be treated as if English criminal law and practice applied to the criminal jurisdiction of the Supreme Court at Hong-Kong, subject, however, to the following reservations:—(i) That such law and practice are not to be considered as in all respects and particulars binding on that Court; (ii) that regard must be had to the

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necessary distinction that must be drawn between the criminal procedure of a European country whose jurisprudence has a defined history extending over many centuries and that applicable to a British possession in the Far East, where a mixed and fluctuating population is subject to the administration of law by European Judges whose duty it is to have regard alike to the principle of British justice and to the necessities of local order; (iii) that the words "so far as circumstances admit," may well (*a*) refer to absence of facilities at Hong Kong for formal proof of Statutes passed and administrative orders made in various parts of His Majesty's dominions, and (*b*) be intended to cover some necessary departures from the formalities only as distinguished from the essentials of English justice, when, as in the present case, a force detailed for the protection of European residents beyond His Majesty's dominions in the midst of a population often turbulant, and at the particular time disturbed was itself disturbed by such a crime as the murder of a Subadar by a native private in the ranks. That in view of the position which the Privy Council held in regard to criminal proceedings, the Judicial Committee did not in this case decide what the rule of English law should be with regard to the admissibility in evidence of statements made by an accused person in answer to a question put by a person in authority in whose custody he is; that should be left to a Court which exercises the revising functions of a general Court of criminal appeal. *Clifford* v. *The King-Emperor, L. R. 40 I. A. 241*, referred to. The Privy Council cannot in a criminal matter allow an appeal on grounds that would not have sufficed for granting leave to appeal. Misdirection as such or irregularity as such will not suffice. There must be something which in the particular case deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of law into a new course, which may be drawn into an evil precedent in future. *Ex parte Macrea*, [1893] A. C. 346, *R.* v. *Bertrand*, 16 L. J. N. S. 752, followed. *Riel* v. *The Queen, 10 A. C. at p. 675, In re Dillet, 12 A. C. 459*, referred to. The jurisdiction of the Privy Council in appeals in criminal matters involves a general consideration of the evidence and of the circumstances of the case in order to place the irregularities complained of, if substantiated, in their proper relation to the whole matter. *Held*, upon a review of the evidence, that the preponderance of unquestioned over the questioned evidence (the accused's statement to the commanding officer) was so great, that it was impossible, at any rate highly improbable, that the jury was substantially influenced by that evidence. Therefore, the fact that the Judge left the objectionable evidence for the consideration of the jury without any warning to disregard it, did not justify the conclusion that there was any miscarriage of justice, substantial, grave or otherwise. *Semble*: Where it is highly improbable that evidence improperly admitted can have had any influence on

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the verdict of the jury, the Appellate Court will be justified in refusing to interfere. *Makin* v. *A.-G. for New South Wales*, [*1894*] *A. C. 57*, considered. IBRAHIM *v.* THE KING (1914) . **18 C. W. N. 705**

EXTRADITION.

Proceedings before the Magistrate without jurisdiction—Power of High Court to interfere with order directing delivery of fugitive offender—Extradition Act (XV of 1903), ss. 10, 15, S. 15 of the Extradition Act ousts the jurisdiction of the High Court to inquire into the propriety of a warrant issued under Chapter III. Where, however, the order of the Magistrate is sought to be justified under an authority supposed to be derived from the law, but is in fact without jurisdiction, such order is revisable by the Court at the instance of the party whose liberty is affected by it. *Emperor* v. *Huseinally Niazally, 7 Bom. L. R. 463, In the matter of Ahadyer, Punj. Rec. 45,* followed. *Attorney-General for Hong-Kong* v. *Kwok-a-Sing, L. R. 5. P. C. 179,* referred to. The High Court set aside the order of the Magistrate directing the delivery of a fugitive offender to the Nepal authorities where he had issued the warrant, at least in the case of one accused, on mere information, without any evidence, where he had failed to report the issue of the warrants to the Political Agent in Nepal, had made an inquiry into the case without a warrant issued by the Political Agent, and had ordered the surrender on a procedure not known to the Extradition Act. GULLI SAHU *v.* EMPEROR (1913) . . **I. L. R. 41 Calc. 400**

EXTRADITION ACT (XV OF 1903).

—— **ss. 10, 15—**

See EXTRADITION.
I. L. R. 41 Calc. 400

F

FAIR TRIAL.

See SECURITY FOR GOOD BEHAVIOUR.
I. L. R. 41 Calc. 806

FICTITIOUS ENTRY.

See REGISTRATION.
I. L. R. 41 Calc. 972

FINDING OF FACT.

See TRANSFER OF PROPERTY ACT (IV OF 1882), S. 41 . **I. L. R. 36 All. 308**

FINDINGS.

—— **repugnancy in—**

See DACOITY . **I. L. R. 41 Calc. 350**

FIRE.

—— **warning of—**

See INSURANCE . **I. L. R. 41 Calc. 581**

FISHERY.

Fishery rights—Jalkar—Navigable river—New Channel—Right to follow river. A *jalkar*, or exclusive right of fishery, granted by the Government in a tidal navigable river in Bengal, extends to all tidal navigable waters formed by the river, whether by a gradual change of course or by a sudden irruption, provided those waters are part of the river system within the upstream and downstream limits of the grant. The rule in the United Kingdom which connects the subject's rights to an exclusive fishery in tidal navigable waters with the limits of the Crown's ownership, is the result of historical and geographical conditions which are not applicable in Bengal. SRINATH ROY *v.* DINABANDHU SEN (1914) . . . . **L. R. 41 I. A. 221 18 C. W. N. 1217**

FISHERY RIGHTS.

See FISHERY . **L. R. 41 I. A. 221**

FITNESS.

See SURETY . **I. L. R. 41 Calc. 764**

FIXED DEPOSIT.

See CHARGE . **I. L. R. 36 All. 507**

FIXTURES.

—— **English Law of—**

See LAND REVENUE CODE (BOM. ACT V OF 1879), S. 83.
I. L. R. 38 Bom. 716

FORECLOSURE.

See APPEAL . **I. L. R. 41 Calc. 418**

See MORTGAGE BY CONDITIONAL SALE.
I. L. R. 36 All. 327

—— **suit for—**

See COURT FEES ACT (VII OF 1870), S. 7 (ix), SCH. I, ART. (1).
I. L. R. 36 All. 40

FOREIGN COURT.

—— **jurisdiction of—**

See FOREIGN JUDGMENT.
I. L. R. 37 Mad. 163

FOREIGN JUDGMENT.

Foreign Judgment, suit on—Jurisdiction of Foreign Court—submission to, by defendants, when defendant carrying on business in foreign territory through agent—No residence thereby—Service of notice of suit on agent, insufficient as against principals outside jurisdiction—Service on principals out of jurisdiction. Submission to the jurisdiction of a foreign forum is largely a question of fact in each case or a mixed question of law and fact. Where defendants submitted to the jurisdiction of foreign Courts by giving a power of attorney as abovementioned to an agent and a decision is passed against them after service of sum-

FOREIGN JUDGMENT—*concld.*

mons of the suit on them while they were out of jurisdiction, by order of Court, the defendants are *primâ facie* bound by the judgment; and where no other defence is raised but that of non-submission and non-service of notice both of which were found against, a decree against the defendants in accordance with the foreign judgment must necessarily follow. Persons who carry on business in a foreign country through an agent submit to the jurisdiction of the Courts of that country by giving that agent a power-of-attorney containing very wide powers including right to institute or defend any suits that might be brought against them touching any matters connected with their business or otherwise. A power-of-attorney of this character which presumably is brought to the notice of persons dealing with the firm is evidence that the principals adpoted the Court of the place wherein the business is carried on, as the forum before which their claims were to be brought. *Bank of Australasia* v. *Harding, 19 L. J. C. P. 345,* and *In re Hainault Forest Act, 9 C. B. Rep. 648 at p. 661* and *Bank of Australasia* v. *Nias, 20 L. J. Q. B. 284,* followed. *Obiter:* A decree obtained in a foreign country against a firm after serving the agent of the firm with notice of the suit while the principals of the firm, who were defendants in the case, were out of its jurisdiction cannot be enforced as a personal decree against them in other Courts. *Sahib Thambi* v. *Hamid, 22 Mad. L. J. 109,* followed. Service of suit on an agent of a partnership whose members reside out of jurisdiction, does not create jurisdiction on the ground of residence. *Nalla Karuppa Settiar* v. *Mahomed Iburam Sahib, I. L. R. 20 Mad. 112,* distinguished. *Fazal Shau Khan* v. *Gafer Khan, I. L. R. 15 Mad. 82, Girdhar Damodhar* v. *Kassigar Hiragar, I. L. R. 17 Bom. 662, Annamalai Chetti* v. *Murugasa Chetti, I. L. R. 26 Mad. 544, Copin* v. *Adamson, 9 Ex. 345, Russell* v. *Cambefort, 23 Q. B. D. 526, Rousillon* v. *Rousillon, 14 Ch. D. 351, Schibsly* v. *Westenholz, 6 Q. B. 155,* and *Emanuel* v. *Symon, [1908] 1 K. B. 302,* referred to. RAMANATHAN CHETTIAR *v.* KALIMUTHU PILLAI (1914)

I. L. R. 37 Mad. 163

FORFEITURE.

——————————*Press Act (I of 1910), ss. 4, 12, 17, 19, 22—Scope of s. 4—"Stating the grounds of its opinion"—Mandatory nature of direction in s. 12—Notification—Grounds—Onus of proof—Limited Jurisdiction of High Court—Executive and Judicial functions contrasted—Intention—Penal Code (Act XLV of 1860), s. 153A.* On an application under the Indian Press Act, 1910, to set aside the order of forfeiture of a pamphlet made by the Local Government: *Held,* that the onus was cast on the petitioner to establish that it was impossible for the pamphlet to come within the terms of s. 4 of the Act and that the functions of the High Court were limited under ss. 17 and 19 to considering whether the petitioner had discharged that onus: the High Court had no jurisdiction to pronounce on the wisdom or unwisdom of the order of forfeiture. The direction in s. 12 of the

FORFEITURE—*concld.*

Act ("stating the grounds of its opinion") was mandatory, and it was not a compliance with the direction merely to cite the words of the section invoked without setting out facts on which the opinion was based, but the High Court was debarred by s. 22 from questioning the legality of the forfeiture on that ground. In an enquiry under this Act, the question of the intention of the writer or publisher is not directly material. *Per* STEPHEN, *J.*—The omission of the Local Government to comply with the mandatory direction contained in s. 12, did not oust the jurisdiction of the High Court to revise the order of forfeiture on its merits. *In re* MAHOMED ALI (1913). **I. L. R. 41 Calc. 466**

FORFEITURE OF PROPERTY.

See PENAL CODE (ACT XLV OF 1860), s. 62 . . . **I. L. R. 36 All. 395**

FORMER RECEIVER.

——————— **suit against—**

See RECEIVER . **I. L. R. 41 Calc. 92**

FRAUD.

See MINOR . . **I. L. R. 37 Mad. 535**

See MORTGAGE . **I. L. R. 38 Bom. 10**

——————— **upon creditor—**

See MORTGAGE . **I. L. R. 38 Bom. 10**

——————— **suit to set aside decree on the ground of—**

See CIVIL PROCEDURE CODE (1908), s. 20 (*c*) . . **I. L. R. 36 All. 563**

——————————*Decree, when can be set aside for fraud—Onus of proof—Res judicata—Evidence Act (I of 1872) s. 44.* It is beyond question that the jurisdiction to impugn a previous decree for fraud exists. But it is a jurisdiction to be exercised with care and reserve, for it would be highly detrimental to encourage the idea in litigants that the final judgment in a suit is to be merely a prelude to further litigation. The fraud used in obtaining a decree being the principal point in issue, it is necessary to establish it by proof before the propriety of the prior decree can be investigated. One who seeks to impugn a decree passed after contest takes on himself a heavy burden, and it is not satisfied by merely inducing the Court to come to the conclusion that the appreciation of the evidence and the ultimate decision in the former suit was erroneous. Nor can a prior judgment be upset on a mere general allegation of fraud or collusion; it must be shown how, when, where and in what way the fraud was committed. The fraud must be actual, positive fraud,—a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance. *Shedden* v. *Patrick et Al, 1 Macq. 535, Ochsenbein* v. *Papelier, L. R. 8 Ch. App. 695,* and *The Duchess of Kingston's Case, 2 Sm. L. C. 11th Ed. 731,* fol-

FRAUD—*concld.*

lowed. The character of fraud vitiating a decree would vary with the circumstances of each class of decree. NANDA KUMAR HOWLADAR *v.* RAM JIBAN HOWLADAR (1914). **I. L. R. 41 Calc. 990**

FRIVOLOUS OR VEXATIOUS COMPLAINT.

See CRIMINAL PROCEDURE CODE, SS. 107, 250 . . **I. L. R. 36 All. 382**

FUGITIVE OFFENDER.

See EXTRADITION.

I. L. R. 41 Calc. 400

G

GARNISHEE.

See CIVIL PROCEDURE CODE (1882), SS. 268, 278, 283.

I. L. R. 38 Bom. 631

See EXECUTION OF DECREE.

I. L. R. 38 Bom. 631

GHATWALI TENURES.

1. ——— *Suit for possession—Court-fee—Court-Fees Act (VII of 1870) s. 7, cl. v., sub. cls. (a), (c), (d).* Where a suit had been brought for recovery of possession of the Ghatwali lands of Rohini and Court-fees had been paid under sub-cl. (*a*) of cl. v. of s. 7 of the Court-Fees Act on ten times the revenue alleged to be payable, and the Court below held that sub-cl. (*c*) was applicable and the value of the subject-matter should be deemed to be fifteen times the net profits: *Held*, that the Ghatwali lands formed part of the estate of the zemindar of Birbhum and the contention that sub-cl. (*c*) was applicable could not be supported. *Kustura Kumari* v. *Manohar Deo*, (*1864*) *W. R. 39, Raja Lilanand* v. *The Government of Bengal, 6 Moo. I. A. 101, Moonranjan* v. *Raja Lilanund, 3 W. R. 84, Raja Leelanund* v. *Monoranjan, 5 W. R. 101, Lilanand Singh* v. *Munorunjan, 13 B. L. R. 124, Lilanund* v. *Munranjan, I. L. R, 3 Calc. 251*, referred to. *Held*, also, that sub-clause (*d*) was applicable, as the land in suit formed part of an estate paying revenue to Government but did not constitute a definite share of such estate, nor was it separately assessed with revenue. Consequently, the value of the subject-matter must be deemed to be the market value of the land. CHANDRA NARAYAN SINGH *v.* ASUTOSH DE (1914) . . . **I. L. R. 41 Calc. 812**

2. ——— *Suit for resumption of land by proprietor—Jaigir, two kinds of—Not necessarily conditional and inalienable—Tenure created by document, evidence necessary to prove incidents of—Fact of descent of land from father to son for a long time, inference to be drawn from—Facts necessary to be proved even if grant originally made subject to performance of service—Limitation—Fact of service being incapable of being enforced, effect of, on service tenure.* The plaintiff brought a suit for the possession of two mouzahs within his

GHATWALI TENURES—*concld.*

zemindari against the defendants who were in possession, having acquired them by a series of purchases from the persons who previously held them under the plaintiff. The plaintiff's case was that the mouzahs in question were a *jaigir* conditional on the performance of *Ghatwali* services and as such were inalienable and the original holders having alienated them the plaintiff was entitled to resume possession: *Held*, on the evidence, that the plaintiff had failed to prove that the land was held on a service tenure, whether *Ghatwali* or otherwise. That a *jaigir* is not necessarily conditional; it may be unconditional and the mere fact that a tenure is described as a *jaigir* by no means conclusive and its incidents must be determined from other circumstances. That where the tenure in question was created by a document, the terms on which the land is held, its alienability and its liability to forfeiture must depend on the terms of the particular grant and not on the terms of grants that may have been made to others. *Per* MOOKERJEE, *J.*—Assuming that the evidence of terms of grants to other persons was admissible, their probative force in this case was valueless. If it is proved by long uninterrupted usage that the lands have passed from father to son for two or three generations without objection, the inference would be that the grant was a grant of inheritance because the fact of descent from father to son is the strongest possible evidence of hereditary character. Assuming it to be established that performance of service was annexed to the grant, the plaintiff would have to prove whether the grant was a mere grant in lieu of wages or was a grant subject to a burden of service; and if the grant was made as a reward for past service the plaintiff would have to prove that merely because performance of service was annexed to the grant, non-performance thereof entitles him to treat the tenure as forfeited. Further, assuming that performance of service could be claimed and had been improperly refused, the plaintiff would have to establish that the tenure which was held partly at least one condition of payment of rent in cash was liable to forfeiture for mere refusal of performance of service, although the cash rent was being paid. That the *Ghatwali* service if ever rendered having terminated in 1886 and the suit having been brought in 1905, any possible claim of the plaintiff to enforce performance of the service or to recover possession on the ground of forfeiture by reason of non-performance of service was barred by limitation. That on principle it may well be maintained that where service can no longer be enforced and the tenure consequently ceases to be a service tenure, the land can be alienated. BHAGWAT BAKSH RAY *v.* SHEO PROSAD SAHU (1913)

18 C. W. N. 297

GIFT.

See GIFT TO A CLASS.

I. L. R. 41 Calc. 1007

See MAHOMEDAN LAW—GIFT.

GIFT TO A CLASS.

See HINDU LAW—WILL.
I. L. R. 41 Calc. 1007

GOOD FAITH.

— **presumption of—**

See DEFAMATION.
I. L. R. 41 Calc. 514

GOVERNMENT REVENUE.

See BABUANA GRANT.
18 C. W. N. 42, 129

GOVERNMENT SERVANT.

——— ——— *Acquitted at Criminal trial dismissed without opportunity to defend himself—Notification of dismissal in gazette—Suit for declaration that dismissal without good grounds and in contravention of Government rules and that notification illegal, if lies—Suit against Crown by dismissed servants for wrongful dismissal or libel, if lies—Specific Relief Act (I of 1877), s. 42.* Where plaintiff who held a ministerial post in the Burdwan Collectorate, having been tried under ss. 116, 161, and 466 of the Penal Code and acquitted, was dismissed by the Collector who based his conclusion not only on the materials on the record of the criminal trial but also on matters outside the record, and this was followed by a notification in the *Calcutta Gazette* to the effect that "*R. H.* having been dismissed from Government service is debarred from re-employment in any capacity under Government:" *Held*, that since a servant of the Crown is liable to dismissal without cause assigned, the plaintiff was not entitled to sue in a Civil Court for a declaration that there were no good grounds for dismissing him. *Voss* v. *Secretary of State, I. L. R. 33 Calc. 669, King* v. *Secretary of State, 13 C. L. J. 357 : s. c. 15 C. W. N. 486n, Cursetji* v. *Secretary of State, I. L. R, 27 Bom. 189,* relied on. That he was not entitled to a declaration that his dismissal was in contravention of the rules framed by Government, because such a relief does not come within the scope of s. 42 of the Specific Relief Act, any claim for consequential relief in respect thereof against Government not being maintainable. *Deokali Koer* v. *Kedar Nath, I. L. R. 39 Calc. 704 : s. c. 16 C. W. N. 838,* relied on. That as the Crown could not be sued for libel, the plaintiff was not entitled to a declaration that his dismissal should not have been notified, assuming that the notification affected his reputation. That Government is within its rights in notifying the dismissal of a servant and forbidding his re-employment. *Per* MOOKERJEE, *J.*—Under Government rules, plaintiff was entitled to be heard in defence before his dismissal. RAM DAS HAZRA *v.* SECRETARY OF STATE FOR INDIA (1912)
18 C. W. N. 106

GOVERNOR-GENERAL IN COUNCIL.

——— **power of, to make Regulations—**

See ELECTION . **I. L. R. 41 Calc. 384**

GOVERNOR-GENERAL IN COUNCIL—*concld.*

——— **sanction by—**

See UNIVERSITY LECTURESHIP.
I. L. R. 41 Calc. 518

GRANT.

——— **doctrine of—**

See LEASE . **I. L. R. 36 All. 387**

GRANT OF LAND.

——— *Grant of land, proof of—Title-deeds, what are—Original grant not forthcoming—Subsequent conveyances through which title derived, if title-deeds—Court refusing to consider them as title-deeds and basing decision on conduct of parties—Error vitiating judgment—Real question not considered—Drainage-channel, dispute between Municipality and private owner as to title to—Boundaries in title-deeds, if may be ignored and title declared up to centre line of channel—Court, if may vary boundaries in title-deeds.* Plaintiffs who sued for recovery of possession of a strip of land lying between their premises and a public road, including a *khal* or *nulla* which lay between the said premises and the road, proved a clear title for over 50 years by a succession of duly registered conveyances, mortgages, reconveyances and other title-deeds and also proved that during that period they had leased portions of the land by leases that themselves were registered. The Judge at the trial accordingly found in the plaintiff's favour, dispossession having taken place within 12 years of the suit. On appeal, the High Court reversed that decision observing that the original grant of the land made by Government about the year 1830 to one Smith to whom plaintiff traced their title, was not forthcoming, and that though in the later conveyances referred to above, the *khal* appeared to have been treated as a part of the subject of the grant, it was unlikely that Government would include it in their grant without securing the continued maintenance in the public interest of a water channel which existed from time out of memory and played a conspicuous part in the drainage system of the local Municipality; and that in the absence of the original grant none of the other documents referred to in the case could be regarded as "being in any sense title-deeds," they being "obviously insufficient to create title" and being "at most mere assertions of title made from time to time by the predecessors-in-interest of the plaintiffs." In this view, it treated the case as though it was one in which the Court had nothing relevant before it but the conduct of the parties to decide whether the plaintiffs or the defendant Municipality were entitled to the land: *Held*, affirming the trial Judge, that it was scarcely possible to conceive of a clearer title by deeds than that which was proved by the plaintiffs, and the High Court was wrong in saying that the plaintiffs had no title-deeds—in consequence of which error it never considered the real question in the case. That having regard to the boundary consistently found in the deeds, which was stated to be the public road, it was impossible to hold that the title of the plaintiffs

GRANT OF LAND—*concld.*

went up only to the centre line of the *khal* and thus make the deeds convey lands marked out by different metes and bounds from that which there appeared. JOHN KING & Co. *v.* HOWRAH MUNICIPALITY (1914) . . . **18 C. W. N. 898**

GRIEVOUS HURT.

See RIOTING . **I. L. R. 41 Calc. 43**

GROUNDS.

See FORFEITURE.
I. L. R. 41 Calc. 466

GUARDIAN.

See MAHOMEDAN LAW—GUARDIAN.

——— **appointment of—**

See MINOR . . **L. R. 41 I. A. 314**

——— **powers of—**

See MAHOMEDAN LAW—MINOR.
I. L. R. 37 Mad. 514

GUARDIAN AD LITEM.

See MINOR . **I. L. R. 37 Mad. 535**

GUARDIAN AND MINOR.

See GUARDIAN AND WARDS ACT (VIII OF 1890), CH. II.
I. L. R. 36 All. 282

See MAHOMEDAN LAW—GUARDIAN.
I. L. R. 36 All. 280

See MAHOMEDAN LAW—MINOR.
I. L. R. 36 All. 466

GUARDIANS AND WARDS ACT (VIII OF 1890).

——— **ss. 7 (2), 29 and 30**—*Guardian appointed by Court incumbrance of minor's property by natural guardian while Court guardian in existence—Encumbrance void—Void deed no consideration for fresh contract on attaining majority.* The appointment of a guardian under the Guardians and Wards Act (VIII of 1890) has the effect of extinguishing the rights of the minor's natural guardian to deal with the minor's property. Where the natural guardian with rights thus extinguished but purporting to act as a *de facto* guardian encumbered the minor's property with his consent: *Held*, that the encumbrances were null and void. An encumbrance thus created without authority cannot be ratified by the minor on attaining majority. There can be no ratification of a transaction which is void owing to the promisor possessing no contractual capacity at the time. Nor can a void deed form a good consideration for a fresh contract made by the minor on attaining majority. ARUMUGUM CHETTI *v.* DURAISINGA TEVAR (1914) . . . **I. L. R. 37 Mad. 38**

——— **ss. 8, 11, 21**—*Application, by relative or friend of minor—Notifying such application, object of—Step-mother, if disqualified from being guardian of person of step-son, where parties governed by Mitakshara school of Hindu law—Purdanashin lady, if may be appointed guardian of person and property of infant—Minor step-mother, if competent to act as guardian of infant adopted son—Considerations which should guide Courts in appointing guardian—Appointment of stranger as guardian of person.* One Dayanidhi died leaving a widow *S*, a daughter and an infant son whom he had adopted during the life-time of his first wife before marrying *S*. The widow applied to be appointed guardian of the person and property of the infant: the application was opposed by the relations of her husband. The objection was that the widow was herself a minor and was not competent as a *purdanashin* lady to take effective charge of the person and property of the infant, and that the application in substance was not made *bonâ fide* in the best interests of the minor concerned. One of the objectors proposed that *G*, a pleader, who was related both to the widow and to the infant, should be appointed guardian and the Collector also acting under s. 8 of the Guardians and Wards Act intimated to the District Judge that a guardian should be appointed, and that the other objector was the most suitable person available for appointment as guardian. The District Judge appointed *G* guardian of the person and property of the infant: *Held*, that the petition of objection suggesting the appointment of *G* as guardian was in substance an application by a relative or friend of the minor for the appointment of a guardian within the meaning of s. 8, cl. (*b*) of the Act, and that the fact that this application was not notified in accordance with s. 11 did not constitute a fatal defect inasmuch as the object of s. 11 is to bring the application to the notice of persons interested in opposing it, and in the present case all the persons interested in the matter of the appointment of a suitable guardian for the minor were present before the Court. That under the Mitakshara school of Hindu law the step-mother is not the heir of her step-son and she cannot be deemed disqualified from being appointed guardian of the step-son on that ground. That it cannot be laid down as an inflexible rule of law that a *purdanashin* lady should not be appointed guardian of the person and property of her infant son, but in the circumstances of the present case the widow could not be appointed guardian of the property of the infant with any prospect of advantage to the infant. That s. 21 of the Act clearly refers to the guardian of the person of an infant and there is much force in the contention that the section is wide enough to cover the case of an adopted son and the step-mother, even if a minor, is competent to act as guardian of the person of the infant adopted son. That in the matter of choosing a guardian of an infant, the Court must be guided entirely by the interests of the ward and in the circumstances of the present case the step-mother should be appointed guardian of the person of the infant, such appointment being for the benefit of the infant. The effect of the appoint-

GUARDIANS AND WARDS ACT (VIII OF 1890) —*contd.*

——— **ss. 8, 11, 21**—*concld.*

ment of a stranger as the guardian of the person of a minor considered. SUNDARMANI DEI *v.* GOKULANAND CHOWDHURY (1912) **18 C. W. N. 160**

ss. 9, 39—

See MAHOMEDAN LAW—GUARDIAN. **I. L. R. 36 All. 280**

——— **ss. 9, 10, 52**—

See MINOR . . **L. R. 41 I. A. 314**

——— **s. 17**—*Infant son of pre-deceased's outcasted son residing with mother in the family of mother's sister—Mother appointing her sister guardian by will—Grandfather nominating a nephew as guardian, but latter unwilling to admit him in family circle—Infant's preference for aunt—Court's discretion in appointing guardian—Welfare of minor, chief consideration—Home influence, value of—Purdanashin lady, if unfit to be guardian of infant of 15 years.* *I*, who had been outcasted, died in April 1899, leaving an infant son who in 1914 was about 15 years old, a widow who died in 1913 and his father *B* who was appointed guardian of the person and property of the infant, in July 1899. *B*, being unable owing to caste difficulties to keep the infant in his custody acquiesced in the appointment, in December 1905, of the infant's mother as guardian of his person, he himself continuing to be the guardian of the infant's property. The infant and his mother took up residence with the latter's sister *F*, and before her death she made a will clearly expressing therein her wish that her sister *F* should after her death be the infant's guardian. On her death *B* applied for the appointment of a nephew of his as the guardian of the person of the infant, and *F* also made a similar application. The uncle and not the aunt was appointed by the District Court. On appeal the High Court ascertained on enquiry from *B* as well as his nominee that neither of them was willing to take the infant into his family circle, and their idea was to place him in charge of a tutor. The infant himself on being examined by the High Court expressed his preference for the aunt. It was found by the District Judge that the education of the infant in her aunt's house had been satisfactory: *Held*, that it was desirable for the welfare of the minor that the aunt and not the uncle should be appointed guardian of the infant's person, and that her being a *purdanashin* lady did not make her unfit to be so appointed as it was undesirable that the infant should at his age be removed from the influences of home life. But it was ordered and the aunt gave assurance that the grandfather and the uncle should have free access to the infant. The primary point for consideration in such a case is what in the circumstances of the case is for the welfare of the infant. In appointing a guardian the Court will pay great attention to the wishes of the father or mother of the infant unless such a course would be disadvantageous to the infant and

GUARDIANS AND WARDS ACT (VIII OF 1890) —*concld.*

——— **s. 17**—*concld.*

regard is always paid to the wishes of the minor if he be of years of discretion. FULKUMAREE BIBEE *v.* BUDH SINGH DHUDHURIA (1914) **18 C. W. N. 1198**

——— **Ch. II.** *Appointment of guardian—Procedure—Evidence—Admissibility of qanungo's report as to fitness of applicant.* Three persons applied to the District Judge to be appointed guardian of the person and property of a minor. The District Judge asked the Collector to say which one of the three persons was the fittest to be appointed guardian. A report was called for by the Collector from the girdawar qanungo, who reported in favour of the respondent. The District Judge, thereupon, appointed him as guardian of the person and property of the minor. *Held*, that the report of the qanungo could not be treated in law as evidence, and it was the duty of the District Judge to have called upon the different claimants to give evidence and decide on that evidence. SUBHAG SINGH *v.* RAGHUNANDAN SINGH (1914) . . . **I. L. R. 36 All. 282**

GUJARAT TALUKDARS ACT (BOM. VI OF 1888, AS AMENDED BY ACT II OF 1905).

——— **ss. 29, 29B** (*1*), (*2*), (*3*) **and 29E**—*Suit upon a mortgage—Talukdari Settlement Officer—Guardian of the minor defendants—Proceedings up to second appeal—Intermediate notification by the said officer calling upon claimants to submit their claims within six months—Plaintiff's non-compliance with the notification—Plaintiff's application to the said officer for a certificate to execute the decree—Refusal of the application—Inability to comply with the notice—The word "inability" not confined to physical inability of the claimant.* In 1904, the plaintiff sued the defendants, who were minors represented by the Talukdari Settlement Officer as their guardian, for a decree upon a mortgage. The first Court held the mortgage to be invalid under the provisions of the Gujarat Talukdars Act (Bom. Act VI of 1888) and granted to the plaintiff a personal decree. On the 27th September 1905, the plaintiff appealed to the District Court against the said decree and a notice of the appeal was issued to the Talukdari Settlement Officer. On the 21st November following, the Talukdari Settlement Officer took over the management of the defendant's estate. The notice of the appeal was served on that officer on the 24th of the same month. On the 28th December 1905, the Talukdari Settlement Officer issued a notification under s. 29B of the Gujarat Talukdars Act (Bom. Act VI of 1888 as amended by Bom. Act II of 1905) calling upon claimants to submit their claims within six months of the date of the notification. On the 14th March 1906 the District Court decided the plaintiff's appeal and modified the decree of the first Court by holding that the plaintiff had a valid mortgage upon the property of the defendants. On the 16th of the same month a copy of the appellate decree was sent to the Talukdari Settlement

GUJARAT TALUKDARS ACT (BOM. VI OF 1888, AS AMENDED BY ACT II OF 1905)—*concld.*

———— **s. 29, 29B, 29E**—*concld.*

Officer on the application of his office. In July 1906, that is, after the expiry of the period of six months given under the notification of the 28th December 1905, the Talukdari Settlement Officer as representing the defendants preferred a second appeal to the High Court against the District Court's decree. The second appeal having failed in August 1907, the plaintiff applied to the Talukdari Settlement Officer for a certificate in order that he might proceed with the execution of the decree and he was informed in reply on the 12th August 1908 that as he had not submitted his claim within six months of the date of the publication of the said notification, his claim was deemed to have been duly discharged and no certificate could be granted to him. One month after the date of the receipt of the said reply, the plaintiff applied for execution and both the lower Courts dismissed his application for execution on the ground that the want of a certificate under s. 29E of the Gujarat Talukdars Act (Bom. Act VI of 1888 as amended by Bom. Act II of 1905) was a valid bar to the execution. On second appeal by the plaintiff: *Held*, that the words "unable" in s. 29B of the Gujarat Talukdars Act (Bom. Act VI of 1888 as amended by Bom. Act II of 1905) was not confined to physical inability on the part of the claimant, that the plaintiff was unable to put forward his real claim at the date of the notification and at the date of the notice he was unable to comply with it within the meaning of s. 29B (*3*) of the Gujarat Talukdars Act (Bom. Act VI of 1888 as amended by Bom. Act II of 1905), and that the inability of the plaintiff having continued during the period of the six months from the date of the notification, the plaintiff was not barred by s. 29B from prosecuting the proceedings in Court. MANILAL POPATLAL *v.* KHODABHAI SARTANSANG (1914)
I. L. R. 38 Bom. 604

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I. L. R. 37 Mad. 548

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———— **constitution of**—

See STATUTE, 24 & 25 VICT., C. 104, SS. 1 AND 2 . **I. L. R. 36 All. 168**

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See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SS. 423, 439.
I. L. R. 37 Mad. 119

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I. L. R. 36 All. 378

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I. L. R. 41 Calc. 173

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I. L. R. 37 Mad. 236

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I. L. R. 41 Calc. 466

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HIGH COURTS ACT, 1861 (24 & 25 Vict., c. 104).

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——— s. 13—

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I. L. R. 37 Mad. 396

HINDU LAW—ADOPTION.

1. ——— *Adoption made by widow of pre-deceased son—Contemporaneous consent of her mother-in-law in whom estate vested as heir.* Under Hindu Law, the widow of a predeceased son can make a valid adoption with the contemporaneous consent of her mother-in-law in whom the estate of the last full owner is vested as an heir. *Payapa* v. *Appanna, I. L. R. 23 Bom. 327*, followed. SIDAPPA *v.* NINGANGAVDA (1914) **I. L. R. 38 Bom. 724**

HINDU LAW—ADOPTION—*concld.*

2. ——— *Adoption—Orphan-adoption—Estoppel—Presumption in favour of adoption, when arises—Practice—Conversion of suit in ejectment into one for partition.* Only the parents of a child can give him in adoption and therefore an orphan cannot be validly given in adoption either by himself or by any one else. *Subbaluvammal* v. *Ammakutti Ammal, 2 Mad. H. C. 129, Balvantrav Bhaskar* v. *Bayabhai et al, 6 Bom. H. C. 83*, and *Bashetiáppa* v. *Shivlingáppa, 10 Bom. H. C. 268*, applied. An invalid adoption does not *per se* destroy the adoptee's rights in the natural family. *Bhavani Shankara Pandit* v. *Ambabay Ammal, 1 Mad. H. C. 363*, and *Lakshmappa* v. *Rámává, 12 Bom. H. C. 364, 397*, followed. No estoppel arises in such a case unless in consequence of the adoption, the position of the party setting up the estoppel is changed to his disadvantage, so as to render it inequitable that the adoptee should be restored to his place in his natural family. *Gopalayyan* v. *Raghupatiayyan, 7 Mad. H. C. 250*, and *Parvatibayamma* v. *Ramakrishna Row, I. L. R. 18 Mad. 145*, followed. No presumption in favour of an adoption arises in the absence of evidence of the giving or acceptance or of circumstances by which such a presumption can be supported, though the adoption may have taken place long before, and been acquiesced in by all concerned. *Anandráv Shivaji et al* v. *Ganesh E. Bokil, 7 Bom. H. C. R., App. xxxiii at p. xxxiv*, distinguished. A suit in ejectment cannot be converted into a suit for partition. VAITHILINGAM *v.* NATESA (1914). . . **I. L. R. 37 Mad. 529**

HINDU LAW—ALIENATION.

See HINDU LAW—WIDOW.

1. ——— *Alienation by widow—Arrangement come to by the widow with consent of their reversioners—Alienation beyond life of widow—Acquiescence in arrangement by persons afterwards suing to set it aside—Ijara, beneficial to estate.* The question in this case was as to the validity of an *ijara* for 60 years dated 7th September 1863, which had been executed by a Hindu widow, a *pardanashin* lady aged 42, with the consent of the then reversioners, and which was part of an arrangement of settlement in which all the branches of her husband's family shared. In a suit brought after the death of the widow by the reversionary heirs of her husband to set aside the *ijara* on the ground that it was an unauthorized interference by the widow with the reversionary interest which she had no power to make: *Held* (affirming the decision of the High Court), that under the circumstances the arrangement was one dictated by the necessities of the case, and the choice of the term of 60 years was for the benefit of the estate. In accordance with the practice of the B oardTheir lordships attached great weight to the sanction by expectant reversioners of an alienation of property by a Hindu woman as affording evidence that the alienation was made under circumstances which rendered it lawful and valid. In this case, from 1882 to 1893 when the

HINDU LAW—ALIENATION—*concld.*

widow died, the persons who now sought to set the *ijara* aside acquiesced in and took the benefit of the arrangement which it might therefore be inferred from their conduct had in their opinion been made in good faith and under such circumstances of necessity as would give it validity according to Hindu law; and the conduct of the appellants themselves during those years afforded evidence on which the respondents were entitled to rely. BIJOY GOPAL MUKERJI v. GIRINDRA NATH MUKERJI (1914) . **I. L. R. 41 Calc. 793**

2. ——————— *Alienation by Hindu widow—Burden of proof—Evidence of legal necessity in mortgages or sale-deeds.* The *onus* of supporting a sale from a Hindu widow is on a purchaser. Recitals in mortgages or deeds of sale with regard to the existence of legal necessity for an alienation by a Hindu widow are not of themselves evidence of such necessity without substantiation by evidence *aliunde*. BRIJ LAL v. INDA KUNWAR (1914) . . **I. L. R. 36 All. 187**

HINDU LAW—DEBT.

——————— *Debt—Pious obligation—Decree debt incurred by father as devastanam committee member—'Avyavaharika,' meaning of.* The liability of a Hindu father, who as a member of a devastanam committee unauthorisedly spends the devastanam funds for expenses of a litigation, and is afterwards directed by the Court to pay the costs out of his own private funds, constitutes, a debt which his sons and grandsons are under a pious obligation to discharge. The expression *'Avyavaharika'* debt means a debt which is not supportable as valid by legal arguments, and on which no right could be established by the creditor in a Court of Justice. *Durbar Khachar* v. *Khachar Harsur, I. L. R. 32 Bom. 348,* dissented from. *Chakouri Mahton* v. *Ganga Parshad, 15 C. L. J. 228,* followed. *Natasayyan* v. *Ponnusami, I. L. R. 16 Mad. 99,* and *Khalilul Rahman* v. *Gobind Pershad, I. L. R. 20 Calc. 328,* referred to. *Ramaiengar* v. *Secretary of State, 20 Mad. L. J. 89,* distinguished. VENUGOPALA NAIDU *v.* RAMANADHAN CHETTY (1914) . . . . **I. L. R. 37 Mad. 458**

HINDU LAW—ENDOWMENT.

——————— *Endowment for worship of an image—Destruction of image, how it affects endowment.* An endowment of land, the income of which is meant to be applied for the purposes of the service of an image of *Shiva,* is not affected by the destruction or mutilation of the image. The religious purpose survives the destruction or mutilation. A new image may be established and consecrated in order that it may be worshipped as intended by the original founder. *Purna Chandra Bysack* v. *Gopal Lal Sett, 8 C. L. J. 369,* and *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra, I. L. R. 37 Calc. 128,* referred to. A tenure dedicated to the service of an image of an idol comes to an end if the person entrusted with the worship repudiates his obligation in that behalf. *Hurrogobind Raha* v. *Ramratno Dey, I. L. R. 4 Calc. 67,*

HINDU LAW—ENDOWMENT—*concld.*

and *Ansar Ali Jemadar* v. *Grey, 2 C. L. J. 403,* followed in principle. BIJOYCHAND MAHATAB *v.* KALIPADA CHATTERJEE (1913).

I. L. R. 41 Calc. 57

HINDU LAW—IMPARTIBLE ESTATE.

——————— *Hindu Law—Impartible estate—Question whether an estate alleged to be a raj was partible or impartible—Question of fact whether estate was a raj—Concurrent decisions of Courts in India—Privy Council, practice of—adoption—joint power to two widows to adopt—Power exercised by surviving widow—Construction of will—No provision for the death of one or two joint donees—No power in Court construing will to make by its interpretation any addition to testamentary dispositions.* In the absence of a sanad under Madras Regulation XXV of 1802, the regulations of that year do not affect the title to any land. *Collector of Trichinopoly* v. *Lekkamani, L. R. 1 I. A. 282, 306,* followed. The acceptance of a sanad in common form under Madras Regulation XXV of 1802 does not of itself, and apart from other circumstances, avail to alter the succession to an hereditary estate. *The Udayarpalayam Case, I. L. R. 28 Mad. 508, 515 : s. c. L. R. 32 I. A. 261, 266,* followed. Unless there be an existing estate with other incidents which a sanad in common form under Madras Regulation XXV of 1802 can operate to confirm, such sanad will confer on or confirm in the grantee an estate descendible according to the ordinary rules of inheritance of the Hindu Law. *Raja Venkata Rao* v. *Court of Wards, I. L. R. 2 Mad. 128 : s. c., L. R. 7 I. A. 38,* followed. In order to establish that any estate is descendible otherwise than in accordance with the ordinary rules of inheritance of the Hindu law, it must be proved either that it is from its nature impartible and descendible to a single heir, or that it is so impartible and descendible by virtue of a special family custom. *Baboo Ganesh Dutt Singh* v. *Maharajah Moheshur Singh, 6 Moo. I. A. 164, 187,* followed. The nature of the estate, and existence or otherwise of a special family custom are questions of fact to be determined on the evidence in each case, *Mallikarajuna* v. *Durga, I. L. R. 13 Mad. 406 : s. c. L. R. 17 I. A. 134,* followed. In a case in which the question was whether the estate of Nidadavole in the Kistna district of the Madras Presidency, which was the subject of a sanad in common form under Madras Regulation XXV of 1802, was partible or impartible, the appellant contended that the grantee had, at and prior to the date of the sanad, an estate of the nature of a raj or principality, and therefore impartible, but he did not rely on any special family custom. *Held* (on the above principles), that the question whether the prior estate was of the nature of a raj or not was a question of fact to be determined on the evidence, and that where both Courts in India had concurrently found it was not a raj but was partible, those findings ought not, according to the practice of the Board, to be disturbed unless they were shown to be not justified by the evidence.

HINDU LAW—IMPARTIBLE ESTATE—*concld.*

Allen v. *Quebec Warehouse Company, L. R. 12 A. C. 101, 104,* followed. Their Lordships, after considering the evidence, so far from being so satisfied, were not prepared to say that they should not have come to the same conclusion on that point. The appeal was therefore dismissed. A Hindu of the Sudra caste by his will made the day before his death in 1864, after bequeathing his estates to his two widows gave them the following power of adoption; "You should adopt a boy who is our sannihita (one closely related) whenever it strikes that our samastanam (family) should continue." This power was not exercised whilst both widows were alive, but by the survivor of the two widows in 1890. *Held,* without deciding the question of the validity or otherwise, under the Hindu law, of a joint power of adoption (for the proper determination of which Their Lordships were of opinion that the materials in this case were insufficient) that the will gave to the widows jointly the power to adopt a son should occasion arise which in their opinion made it desirable to do so: but only one of the widows could receive the boy in adoption so as to step into the position of being his adoptive mother. On a consideration of the surrounding circumstances there was nothing which required or justified their Lordships in interpreting the provisions of the will with regard to the adoption in any special way arising from the fact that the testator was a Hindu; and they must adhere to the plain meaning of the language used. The exercise of the power was vested in the discretion of the joint donees, and it was clearly the law that in such a case the death of one of the donees put an end to the joint power; not by virtue of any peculiar doctrine of English law, or series of English decisions, but flowing from the nature of a joint power. The case was different when the power vested not in specific persons, but in the occupants for the time being of a specified office, such as executors. The words of the will, when properly construed, related to choice and adoption by the two widows acting jointly. Hence the words referred only to the period of time when both widows were living. To hold that one of the widows could adopt a son after the death of the other widow, would be providing for a period of time which the testator left unprovided for, and would be making an addition to his testamentary dispositions which no Court construing a will was entitled to do. NARASIMHA *v.* PARTHASARATHY (1914)

I. L. R. 37 Mad. 199

HINDU LAW—INHERITANCE.

1. ——— *Babuana and sohag grants—Kulachar—Exclusion of widows—Application of custom after partition.* In an impartible raj, descending according to primogeniture, *babuana* and *sohag* grants were by custom made to younger sons and to their wives respectively. These grants were subject to a *kulachar* by which they enured for the benefit of the grantees and their heirs-male in the male line, with reversion to the *Raj reasat.* The evidence established that the *kulachar* excluded widows from succession

HINDU LAW—INHERITANCE—*concld.*

to properties so granted, but there was no evidence of the exclusion of a widow after a partition between members of the family jointly holding properties originally the subject of *babuana* and *sohag* grants. *Held,* (i) that the custom excluding widows applied notwithstanding a partition; (ii) that the words "*auras putra poutradik*" in sanads for *babuana* grants must be construed as subject to the custom excluding widows and not as general words of inheritance. *Durgadut Singh* v. *Rameshwar Singh, L. R. 36 I. A. 176,* explained. *Ram Lal Mookerji* v. *Secretary of State for India, L. R. 8 I. A. 46,* distinguished. EKRADESHWAR SINGH *v.* JANESHWARI BAHUASIN (1914)

L. R. 41 I. A. 275

2. ——— *Mitakshara—Bandhus—Limit of Heritable Bandhus—Bhinna gotra sapindas.* The word "*bandhu*" has in the system of Mitakshara a distinct and technical meaning and signifies the *bhinna-gotra sapindas.* The *sapinda* relationship, upon which the heritable right of collaterals is founded, ceases in the case of *bhinna-gotra sapindas* with the fifth degree from the common ancestor; further, in order to entitle a *bandhu* to inherit he must be so related to the deceased person that they are mutually *sapindas* of one another. The right of inheritance, consequently, does not extend to a deceased person's paternal grandfather's son's son's daughter's daughter's sons, since they are *bhinna gotras* beyond the fifth degree and the element of mutuality of *sapindaship* is wanting. RAM CHANDRA MARTAND WAIKAR *v.* VINAYAK VENKATESH KOTHEKAR (1914) . . . **L. R. 41 I. A. 290**

HINDU LAW—JOINT FAMILY.

1. ——— *Joint Hindu family—Antecedent debt—Mortgage executed by father to complete purchase of immoveable property at an execution sale, but executed after expiry of time for paying in the balance of the price—Property nevertheless remaining with the purchaser.* An auction-purchaser of immoveable property paid in the amount required by law as a preliminary deposit, but, being unable to find the remainder of the auction price, borrowed it on the security of a mortgage comprising the property purchased at the auction sale and also some property of the joint family of which the auction purchaser was the head. This mortgage was, however, executed after the expiry of the time fixed by law for payment of the balance of the auction price. The executing Court refused to accept payment of the balance, but the property remained with the purchaser, apparently in virtue of some arrangements with the judgment-debtor by whom ostensibly the decree was satisfied. *Held,* in the circumstances above described, that the mortgagee was entitled to recover on his mortgage, and that the sons of the mortgagor could not be heard to plead that the mortgage money was not borrowed to pay an antecedent debt, within the meaning of the Hindu law. KAPILDEO *v.* THAKUR PRASAD (1913) **I. L. R. 36 All. 17**

HINDU LAW—JOINT FAMILY—*contd.*

2. ——— *Sale of family property by managing member for the benefit of the family—Sale binding on minor members of the family.* The managing member of a joint Hindu family sold certain joint family property for the purpose of providing funds for the marriage of one of the female members of the family and partly of carrying on a shop in which the family was interested. *Held,* that sale was valid and binding on the minor members of the family, although the vendor was not in the circumstances of the case their natural guardian. *Hunoomanpersaud Panday* v. *Munraj Koonweree, 6 Moo. I. A. 393, 412,* and *Mohanund Mondul* v. *Nafur Mondul, I. L. R. 26 Calc. 820,* referred to. RAM CHARAN *v.* MIHIN LAL (1914) . . . **I. L. R. 36 All. 158**

3. ——— *Joint Hindu-family—Parties to suits on mortgages—Members of Joint Hindu family represented by managing members of the family—Suit by members not made parties to suit to redeem property sold in execution of mortgage executed by managing members—Transfer of Property Act (IVof 1882), s. 85.* In this appeal their Lordships of the Judicial Committee affirmed the decision of the High Court in *Jaddo Kunwar* v. *Sheo Shankar Ram, I. L. R. 33 All. 71,* on the ground that the plaintiffs (appellants) who sued to redeem a mortgage after foreclosure on the plea that they had not been parties to the mortgage suit, were properly and effectively represented in the suit by the managing members of the Hindu joint family of which the plaintiffs were also members, and that in such a case the Court was not bound to set aside the execution proceedings where substantial justice had been done merely because every existing member of the family was not formally a party to the suit. Their Lordships saw no reason to dissent from the Indian decisions which showed that there were occasions, including foreclosure actions, when the managers of a Hindu joint family so effectively represented all the other members that the family as whole was bound and were of opinion that it was clear on the facts of this case, and on the findings of the Court upon them, that it was a case where that principle ought to be applied. There was not the slightest ground for suggesting that the managers of the joint family did not act in every way in the interests of the family itself, and no question arose under s. 85 of the Transfer of Property Act (IV of 1882), because the mortgagee had no notice of the plaintiff's interests. SHEO SHANKAR RAM *v.* JADDO KUNWAR (1914) **I. L. R. 36 All. 383**

4. ——— *Joint family—Twice-born caste—Debt—Marriage expenses of male member, binding on the family.* Marriage is obligatory on Hindus who do not desire to adopt the life of a perpetual Brahmachari or of a Sanyasi and debt reasonably incurred for the marriage of a twice-born Hindu male are binding on the joint family properties. *Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya, I. L. R. 27 Mad. 206,* overruled, *Kameswara Sastri Veeracharlu, I. L. R. 34 Mad. 422,* approved. GOPALAKRISHNAM *v.* VENKATANARASA (1914) **I. L. R. 37 Mad. 273**

HINDU LAW—JOINT FAMILY—*concld.*

5. ——— *Jiont family—Alienation by managing member in part for necessity—Co-parcener's suit to set it aside—Form of decree—Practice.* Where the managing member of a joint Hindu family consisting of himself and his nephew sold family property for a consideration of which part was found to be binding on the family, and the nephew sued to recover his share of the property from the alienee: *Held,* that according to equitable principles, in the absence of anything appearing to the contrary, the whole of the consideration for the sale, the valid as well as the invalid portion thereof, must be distributed over the whole of the property sold in proportion to the value of each part. *Marappa Gaundan* v. *Rangasami Gaundan, I. L. R. 23 Mad. 80,* dissented from. The proper decree in such a case is to decree to the plaintiff his share of the property sold after division by metes and bounds, on condition that he pays to the defendant a proportionate share of the consideration found binding, together with mesne profits from the day that he deposits the amount into Court, and gives notice thereof, to the defendant. VADIVELAM *v.* NATESAM (1914) **I. L. R. 37 Mad. 435**

6. ——— *Self-acquisition, property in name of co-parcener when—Test, source of purchase-money.* Where there is a dispute whether a property standing in the name of a junior member of a Hindu family is his self-acquisition, the criterion is from what source the money comes with which the purchase-money is paid. *Dhurm Das Pandey* v. *Shama Soondri Dibiah, 3 Moo. I. A. 299, Gopi Krist Gosain* v. *Gungapersaud Gosain, 6 Moo. I. A. 53,* followed. Where there was no evidence that the son in whose name the property was purchased had any separate fund or that the properties in dispute were purchased with money belonging to him: *Held,* that the presumption was clear and decisive that the property was acquired by the father in the name of the son and it was not the latter's self-acquired property. PARBATI DASI *v.* RAJA BAIKUNTHA NATH DEY (1913) **18 C. W. N. 428**

HINDU LAW—MAINTENANCE.

——— *Maintenance—Daughter-in-law, whether entitled to be maintained, in the absence of ancestral property—Rules of Hindu Law, when binding on Courts—Rule of equity, justice and good conscience.* A Hindu is under no legal obligation to maintain his widowed daughter-in-law when he has no ancestral assets in his hands. The rules on Hindu Law are binding on the Court only where it is necessary to decide any question regarding succession, inheritance, marriage or caste or any religious usage or institution. Where maintenance is claimed against a person not on the ground that the property coming by inheritance to him is burdened with the maintenance of the

HINDU LAW—MAINTENANCE—*concld.*

person claiming it, but on the ground that the Hindu Law-givers have placed such a duty on him, the Hindu Law, as such, has no obligatory force, and the Court would have to decide the question in accordance with equity, justice and good conscience. Though the rules and precepts of Hindu Law-givers might often be entitled to great respect in deciding the rule of justice in such cases, the weight due to them would depend upon the circumstances of each case including the conditions of modern society, and the conceptions of equity and justice which the Court considers it right to give effect to. *Semble:* There may be special circumstances which may make it equitable and just in a particular case to uphold the claim for maintenance, in the absence of ancestral property. *Khetramani Dasi* v. *Kashinath Das, 2 B. L. R. (A. C. J.) 15*, applied. *Rangammal* v. *Echammal, I. L. R. 22 Mad. 304*, explained. MEENAKSHI AMMAL *v.* RAMA AIYAR (1914) . . . . **I. L. R. 37 Mad. 396**

HINDU LAW—MANAGER.

See LIMITATION ACT, 1908, s. 7, SCH. I, ART. 44 . . **I. L. R. 38 Bom. 94**

HINDU LAW—PARTITION.

——— *Hindu Joint Family—Decrees for partition—Deficit in share of last co-sharer—Res judicata—Estoppel—Civil Procedure Code (Act XIV of 1882), s. 13.* A decree for partition made in a suit instituted by a member of a joint Hindu family is *res judicata* as between all co-sharers who are parties to the suit. Where, therefore, in a seres of suits all the co-sharers except one have obtained decrees partitioning to them their respective shares by metes and bounds, a co-sharer, who was a party to the suits, is estopped from alleging that the property left unpartitioned is less than the share to which he is entitled. NALINI KANTA LAHIRI *v.* SARNAMOYI DEBYA (1914) . . . . **L. R. 41 I. A. 247**

HINDU LAW—SHEBAIT.

——— *Shebait's right to take a share of surplus income from offerings—Hindu widow succeeding to shebaitship—Sale of right to take surplus offerings by creditor of widow in execution and purchase by himself—Suit by widow to set aside decree and sale as fraudulent—Dismissal of suit as barred under s. 244, Civil Procedure Code (Act XIV of 1882) if legal—Suit by reversioner for declaration of his right to surplus income—Limitation—Appropriation of income if amounts to dispossession of office, or is act of ordinary trespass only.—Res judicata.* One of several co-shebaits of a temple who was entitled to receive a 3½ as. share of the daily surplus income from the offerings to the temple having died, his widow succeeded to the shebaitship. A creditor of the widow, *G*, obtained a decree against her and caused the 3½ as. share of the surplus daily offerings to be put up for sale, and himself purchased it, and from 1892 onwards went on appropriating the same.

HINDU LAW—SHEBAIT—*concld.*

The widow's suit to set aside the sale on the ground that both the decree and the sale were fraudulent was dismissed in the view that her remedy was by application under s. 244 of Act XIV of 1882 and not by a suit. The widow died in 1890, and the plaintiff, her husband's reversionary heir, brought this suit in 1910 for a declaration that he was entitled to receive the said 3½ as. share of the surplus income. The office of the shebait was a hereditary one which could not be held by any one who was not a Brahmin Panda, and the purchaser was not a Brahmin Panda but a man of inferior caste who was not competent to hold the shebait's office or to provide for the performance of the duties of that office: *Held*, that the appropriation from time to time by the purchaser of the income derivable from the 3½ as. share did not deprive *G* or the plaintiff of the possession of the office of the shebait, although that income was receivable by them in right of the shebaitship, and Art. 124 of the Limitation Act had no application to the case. By adversely taking and appropriating to his own use a share of the surplus daily income from the offerings, the purchaser acquired no title and no right to a share of that income. On each occasion upon which he appropriated the share of the surplus income, he committed a fresh actionable wrong in respect of which a suit could be brought against the shebait. The right to the office of the shebait did not arise from or depend upon the receipt of a share of the surplus daily income from the offerings, although the right to receive it was attached to and dependent on the possession of the right to the shebaitship. *Held*, also, that the defendant's further plea that the suit was barred by *res judicata* was untenable. BHAIAJI THAKUR *v.* JHARULA DAS (1914) **18 C. W. N. 1029**

HINDU LAW—STRIDHAN.

1. ——— *Widow's estate—Alienation—Property acquired by Hindu widow with accumulations of income of husband's estate.* Property acquired by a Hindu widow, with accumulations of the income of her husband's estate, does not constitute her *stridhan* but forms part of the *corpus* of the estate and as such as inalienable except for purposes that would justify alienation of the original estate. *Bhagbutti Deyi* v. *Bholanath Thakoor, I. L. R. 1 Calc. 104*; *L. R. 2 I. A. 256*, and *Ishri Dutt Kor* v. *Hansbutti Koerain, I. L. R. 10 Calc. 324*; *L. R. 10 I. A. 150*, referred to. KULA CHANDRA CHAKRAVARTI *v.* BAMA SUNDARI DASEE (1914) . **I. L. R. 41 Calc. 870**

2. ——— *Stridhan — Order of succession according to Mitakshara—Brother's widow not an heir—Burden of proof in suit for possession.* The stridhanam property of a Hindu female devolves on her death on her husband, and failing the husband, on his sapindas in the order laid down in the Mitakshara with reference to the succession to the property of a male. *Marya Pillai* v. *Sivabagyathachi, 2 Mad. W. N. 168*, followed. A brother's widow is a *gotraja sapinda*

HINDU LAW—STRIDHAN—*concld.*

but is not entitled to succeed as an heir under the Madras system of inheritance. *Balamma* v. *Pullayya, I. L. R. 18 Mad. 168*, followed. *Mari* v. *Chinnammal, I. L. R. 8 Mad. 107*, and *Venkatasubramaniam Chetti* v. *Thayarammah, I. L. R. 21 Mad. 263*, referred to. On failure of the husband's sapindas, the blood relations of the *propositus* are entitled to succeed to the exclusion of the Crown. A plaintiff seeking to recover possession from a defendant in possession though as a trespasser, must prove his own title. KANAKAMMAL *v.* ANANTHAMATHI AMMAL (1914)

I. L. R. 37 Mad. 293

HINDU LAW—SUCCESSION.

1. ——— *Mitakshara—Succession—Priority—Full sister—Son of a separated half-brother—Civil Procedure Code (Act V of 1908), s. 11—Res judicata between co-defendants.* Under the Mitakshara, the son of a separated half-brother is entitled to succeed in preference to a full sister of the *propositus*. *Bhagwan* v. *Warubai, I. L. R. 32 Bom. 300*, followed. *Per* SHAH J.—In order that any decision between co-defendants might operate as *res judicata* in any subsequent suit between them, it is necessary to establish that there was a conflict of interests among the defendants, and that there was a judgment defining the real rights and obligations of the defendants *inter se*. *Ramchandra Narayan* v. *Narayan Mahadev, I. L. R. 11 Bom. 216*, followed. HARI ANNAJI v. VASUDEV JANARDAN (1914)

I. L. R. 38 Bom. 438

2. ——— *Succession—Step-mother cannot inherit under Mitakshara law but may inherit according to a special caste custom.* A step-mother is not to be allowed to inherit to her step-son as a *gotraja sapinda*. *Mari* v. *Chinnammal, I. L. R. 8 Mad. 107*, explained. The *Mitakshara* law (apart from usage) does not recognise a step-mother as in the line of heirs at all. Property should go to the Crown in preference to her. This case was remanded on the following additional issue (*inter alia*), "whether according to the usage of the caste to which she and the first defendant belong, the step-mother is entitled to inherit to her step-son?" SEETHAI *v.* NACHIAR (1914)

I. L. R. 37 Mad. 286

3. ——— *Custom of primogeniture—Allegation of family or local custom—What must be proved—Continuity and immemorial user—Onus—Finding that custom proved, if finding of fact—Record-of-rights pending suit—Judgment of revenue officer in settlement proceedings, if evidence in suit—Attestation proceeding, finding in favour of custom recorded at, and based upon, hearsay.* Whether certain facts found by the lower Appellate Court (and as such binding on the High Court) do or do not establish an alleged custom of primogeniture, is a question of law. Where a party relies upon a special custom of a family to take the succession out of the ordinary Hindu Law such custom must be proved to be ancient and continuous. The alleged custom must be very satisfactorily

HINDU LAW—SUCCESSION—*contd.*

proved by evidence of particular instances so numerous as to justify the Court in finding in favour of the custom. Where subsequently to the institution of the suit, and at the attestation stage of proceedings for preparation of record-of-rights, an Assistant Settlement Officer found upon information gathered from the tehsildar of the Raja's estate that the custom of primogeniture prevailed among Kurmi Mahtos in 82 out of 84 of the villages within the estate and the lower Appellate Court relying upon this judgment found the custom established in the village in suit, the parties being Kurmi Mahtos: *Held*, that, apart from the circumstance that the fact of the record-of-rights having been completed since the institution of the suit affected the value and importance of the decision of the Settlement Officer, his judgment had been used for a purpose for which it was not admissible in law. That reliance might possibly have been placed upon it to show that the custom was recognised by the revenue authorities, but the findings of the Settlement Officer could not be incorporated into the evidence in the case and treated as practically conclusive between the parties. That whether the Assistant Settlement Officer was competent or not to act upon information gathered from the Raja's tehsildar (which was clearly not legal evidence), that statement of the tahsildar was inadmissible in evidence in the Civil Court. DURGA CHARAN MAHTO *v.* RAGHUNATH MAHTO (1913)

18 C. W. N. 55

4. ——— *Succession to a yati (religious ascetic)—Chela or sisya (disciple or pupil) of Hindu religious ascetic or mendicant—Heirs natural and special under rules of Hindu Law.* A Brahmin who had left his home in early life and settled in Burrabazar in Calcutta, where he lived the life of a Hindu mendicant and practised religious austerities but dressed himself in ordinary cloths and deposited monies with firms in Burrabazar on interest, and had also acquired property in the Punjab, cannot be taken to have renounced the world and was not a *yati* or a religious ascetic in the sense of the Hindu Law and on his death his natural heirs under the ordinary rules of the Hindu Law are entitled to succeed to his property. Nor was the plaintiff who claimed to be the heir of the deceased Brahmin as his *chela*, was his *satsisya* or virtuous pupil in the sense of the Hindu law and was not entitled to succeed against his natural heirs, who have proved themselves to be his legal heirs. GOURI SUNKER BYAS *v.* NIADER SINGH (1913) . . . . **18 C. W. N. 59**

5. ——— *Dayabhaga School—Doctrine of spiritual benefit—Paternal great-grand-father's son's daughter's son and maternal uncle, who is preferable.* Under the Dayabhaga School of Hindu Law, the paternal great-grandfather's son's daughter's son of a deceased Hindu is preferable to his mother's brother as heir, even though the latter is specifically mentioned in the Dayabhaga as an heir and the former is not, and his precise position in the category of heirs is not laid down in the case of *Guru Gobind* v. *Ananda Lal*,

HINDU LAW—SUCCESSION—*contd.*

13 W. R. F. B. 49, Braja Lal v. *Jiban Krishna, I. L. R. 26 Calc. 285,* referred to. KAILASH CHUNDER ADHIKARI *v.* KARUNA NATH CHOWDHRY (1913) **18 C. W. N. 477**

6. ——— *Daughters inheriting father's estate jointly—Death of one—The other if succeeds to deceased's interest as reversionary heir—Adverse possession for more than twelve years during both daughters' lifetime—Surviving daughter's right to recover moiety share belonging to deceased, if arises from her death—Limitation Act (IX of 1908), Sch. I, Art. 141.* Where one of two daughters of a Hindu, who inherited his properties, died, the survivor did not acquire in the interest enjoyed by the deceased a title of the nature described in Art. 141 of Sch. I of the Limitation Act. Where after both daughters had been kept out of possession for more than 12 years one of them died, and the other by some means or other got back possession: *Held,* that she could not maintain her possession against the person who by 12 years adverse possession had acquired title in the entire property, including the interest of the deceased daughter, to which she succeeded by survivorship and not by inheritance. SACHINDRA KISHORE DEY *v.* RAJANI KANT CHUCKERBUTTY 1914) . . . . **18 C. W. N. 904**

7. ——— *Mitakshara—"Sapindaship," definition of, if governs inheritance or marriage only—Bhinnagotra sapindas or bandhus who may succeed as—Limit of five degrees and mutuality to be satisfied—Classes of bandhus enumerated in Mitakshara, if to be extended—Interpretation of rules of Hindu Law—Suit in ejectment—Plaintiff to strictly prove title. Sapinda* relationship, according to the Mitakshara, is based not on the presentation of funeral oblations, but on descent from a common ancestor, and in the case of females, also on marriage with descendants from a common ancestor, this relationship ceasing—not merely for purposes of marriage, but generally and therefore for purposes of inheritance also—after the seventh degree from the common ancestor on the father's side and fifth on the mother's. The word "*bandhu*" in the system of the Mitakshara bears a distinct and technical meaning signifying the *bhinna-gotra sapindas,* and the limitation of the five degrees clearly applies and can only apply to the *bhinna-gotra sapindas.* Besides being within the fifth degree from the common ancestor, a *bandhu* to be entitled to succeed to the inheritance must be so related to the *propositus* that they are *sapindas* to each other. *Held,* accordingly, that the plaintiffs who were the paternal grand-father's son's son's daughter's daughter's sons of the *propositus* were not his heirs, both because they were his *bhinna-gotra* beyond the fifth degree and also because the element of mutuality was wanting between them and the *propositus.* The ruling in *Gridari Lal* v. *The Bengal Government, 12 Moo. I. A. 448,* that the enumeration of *bandhus* who were entitled to succeed is not exhaustive but merely illustrative, hardly warrants the conclusion that the classes specified by Vijnaneswar, *viz., atma-bandhus, pitri-bandhus, matri-bandhus,* can be added to. *Lallubhai* v. *Mankuvarbai, I L. R. 2 Bom. 588, Umaid Bahadur* v. *Udai Chand, 4 C. W. N. 866 : s. c., I. L. R. 25 Mad. 61, Babu Lal* v. *Nanku Ram, I. L. R. 22 Calc. 339,* referred to. The Hindu Law contains its own principles of exposition, and questions arising under it cannot be determined on abstract reasoning or analogies borrowed from other systems of law, but must depend for their decisions on the rules and doctrines enunciated by its own law-givers and recognised expounders. RAMCHANDRA MARTAND WAIKAR *v.* VINAYAK VENKATESH KOTHEKAR (1914) . . . . **18 C. W. N. 1154**
L. R. 41 I. A. 290.

HINDU LAW—SUCCESSION—*concld.*

HINDU LAW—WIDOW.

See HINDU LAW—ALIENATION.

1. ——— *Widow—Alienation—Consent of next reversioner—Validity of alienation—Legal necessity need not be proved—Registration Act (XVI of 1908), s. 17, cl. (d)—Document showing assent—Spes succession is—Registration not compulsory.* A Hindu widow who had inherited property from her husband alienated a portion of it. Her only daughter assented to the alienation a few days after by a writing which was not registered. After the deaths of the widow and the daughter, an heir of the daughter sued to set aside the alienation on the ground that it was not made for legal necessity. The Court found the legal necessity not proved, and decreed the claim. The defendant having appealed:—*Held,* that the alienation having been assented to by the next reversioner, no question of legal necessity could arise. *Held,* also, that the assent in writing was not compulsorily registrable under s. 17, cl. (*d*) of the Registration Act, for the executant had at its date no more than *spes successuionis* as heir. MALLIK SAHIB *v.* MALLIKARJUNAPPA (1913) **I. L. R. 38 Bom. 224**

2. ——— *Alienation—Settlement of dispute by compromise—Hindu widow who is party if thereby alienates property in excess of her powers.* A dispute between the daughters of a deceased Hindu on the one hand and the widow of his alleged adopted son on the other, each party claiming to be solely entitled to the estate, was settled by a compromise, each party getting thereunder a share in the family property. In a suit by a daughter of the alleged adopted son (as one of the reversionary heirs expectant on her mother's death) to set aside the compromise as beyond the competence of a limited owner like her mother: *Held,* that the compromise was in no sense of the word an alienation by a limited owner of the family property, but a family settlement in which each party takes a share of the family property by virtue of the independent title which is, to that extent, and by way of compromise, admitted by the other parties. *Lala Khunni Lal* v. *Kunwar Gobind Krishna Narain, L. R. 38 I. A. 87 : s. c. 15 C. W. N. 545,* followed. HIRAN BIBI *v.* SOHAN BIBI (1914) . . . . **18 C. W. N. 929**

HINDU LAW—WIDOW—*concld.*

3. ——————— *Alienation by Hindu widow—Suit by vendee to recover property after widow's death from stranger—Proof of legal necessity, if necessary.* An alienation by a Hindu widow without legal necessity is voidable but not void, and until the reversioner (including in that term the Crown if there is no nearer reversioner) decides to avoid it or to treat it as a nullity, it stands good, and the alienee is entitled to recover possession from a stranger without being required to prove legal necessity. *Bejoy Gopal* v. *Krishna Mahishi, I. L. R. 25 Calc. 1, Madhusudan* v. *Rooke, 11 C. W. N. 424,* referred to. DEONANDAN PERSHAD *v.* UDIT NARAIN SINGH (1914)

18 C. W. N. 940

4. ——————— *Alienation—Legal necessity—Pilgrimage to Gaya—Feast given after return from Gaya, whether legal necessity—Reversioner—Suit for declaration that alienation was without legal necessity—No offer to reimburse money spent on legal necessity—Suit whether maintainable.* A Hindu widow is competent to alienate her husband's estate for expenses in connection with a feast given to Brahmins, etc., after return from pilgrimage to Gaya. *Makhan Lal* v. *Gyan Singh, I. L. R. 33 All. 255,* not followed. *Quære:* Whether a declaratory suit can be maintained by a reversioner who does not offer in the plaint to reimburse the purchaser to the extent that the sale was for necessity. DINANATH GHOSH *v.* HRISHIKESH PAL (1914) . . . **18 C. W. N. 1303**

5. ——————— *Widow—Alienation in part for necessity—Reversioner suing for declaraition as to invalidity of sale, on payment of binding portion of the consideration—Absence of offer to pay, if fatal to suit—Conditional declaration—Form of decree.* When a reversioner, during the life-time of the widow, sues for a declaration that an alienation in part for necessity, is invalid beyond the life-time of the widow, on payment of the binding portion of the consideration: *Held,* that the suit should not fail on the mere ground of the absence of an offer in the plaint to pay the amount that was binding on the reversioner. *Singam Setti Sanjivi Kondayya* v. *Draupadi Boyamma, I. L. R. 31 Mad. 153,* not followed. *Bhagwat Dayal Singh* v. *Debi Dayal Sahu, I. L. R. 35 Calc. 420,* applied. *Held,* also, that a conditional decree may be passed. *Mahomed Shumshool* v. *Shewukram, L. R. 2 I. A. 7,* referred to. *Per* SUNDRA AYYAR J.—The uncertainty regarding the person who would be entitled to succeed the widow is no ground for refusing a declaration regarding the character of the alienation, and a declaration may be made that the alienation is invalid as a whole, but that on equitable grounds the alienee should have a charge declared in his favour for the binding portion of the consideration. *Isri Dutt Koer* v. *Hansbutti Koerain, L. R. 10 I. A. 150,* applied. *Semble:* The proper form of the decree in such suits is merely to make a declaration that the alienee has a charge for a certain sum of money. PAPARAYUDU *v.* RATTAMMA (1914) . . **I. L. R. 37 Mad. 275**

HINDU LAW—WILL

1. ——————— *Construction of will—Contingent bequest in futuro of whole estate—Succession Act (X of 1865), s. 107, Part XV.* A Hindu governed by the Bengal School of Hindu Law died leaving a will, the material portion whereof was as follows:—"I hereby authorise my said wife to adopt *dattaka putra.* In case of death of an adopted son my said wife shall adopt one after another five sons in succession. If my said wife dies without adopting a son or if such adopted son predeceases her without leaving any male issue, in such case my estate after the death of my said wife shall pass to the sons of my sister, Sreemati Benodini Dassee, who may be living at the time of my death." There were two sons of the testator's sister living at his death. The widow adopted a son who predeceased her unmarried: she then died. On a suit for a construction of the will:—*Held,* that there was a valid contingent bequest in favour of the testator's nephews, which came into operation in the events that had occurred. A contingent bequest *in futuro* of the whole estate of a testator is valid and operative under Hindu Law. *Soorjee Money Dassee* v. *Denobundoo Mullick, 9 Moo. I. A. 123,* referred to. BHUPENDRA KRISHNA GHOSE *v.* AMARENDRA NATH DEY (1913)

I. L. R. 41 Calc. 642

2. ——————— *Construction of will—Bequests to daughters in equal shares—Subsequent event of death of one daughter leaving male issue—Gift to a class some of whom born out of time.* In this case their Lordships of the Judicial Committee upheld the decision, on appeal, of the High Court in *Radha Prasad Mullick* v. *Ranimoni Dasi, I. L. R. 38 Calc. 188,* to the effect that on the death of Premmoni Dassi leaving male issue, the moiety of the testator's estate enjoyed by her did not pass by survivorship to her sister Ranimoni Dasi, but devolved on the sons of Premmoni Dasi, who were in existence at the date of the death of the testator. Their Lordships did not decide the question whether the High Court was wrong in holding that no grandson of the testator born or adopted after his death could take under his will, but said that their decision in the present appeal was not to prejudice the position of Jugal Kishore Sen, the second appellant, if and when such question came before a Court for decision. RANIMONI DASI *v.* RADHA PRASAD MULLICK (1914)

I. L. R. 41 Calc. 1007

3. ——————— *Construction of will—Self-acquired property—Bequest dividing property between testator's two sons with gift over to survivor—Survivorship whether limited to survivorship during testator's life or extending to period after his death—Period of distribution.* A Hindu resident of Surat in the Presidency of Bombay made a will dated 20th August 1899, by which after appointing his two sons "executors, heirs and owners" of the whole of his property (which was self-acquired) and directing them to divide and take equal shares in it with certain exceptions, gave each of them a half share of his estate not speci

HINDU LAW—WILL—*contd.*

fically disposed of by the will. By clause 9 he made the following bequests: "I have divided between and given to my two sons the whole of my property as mentioned above. But should either of these two sons die without having had (leaving) any male issue, the survivor of the said two sons is duly to take the whole of the property appertaining to the share of the deceased son who may have (leave) no male issue (behind him) after undertaking (to defray) the expenses in connection with the maintenance of his widow and marriage of his minor daughter. But under the circusmtances the heirs of my deceased son Surajlal shall not get any right whatever." The testator died on 4th July 1901 leaving him surviving his two sons. The elder son died on 2nd January 1903 leaving a widow and a daughter. In a suit by the surviving son to enforce the provisions of cl. 9 of the will, the High Court held that the period of distribution contemplated by the testator was the period of his death at which his time half of his estate became vested in each of his sons absolutely, and that cl. 9 should be read as if the survivorship there provided was limited to survivorship at the death of the testator. *Held*, (reversing that decision) that the words of cl. 9 were not limited to survivorship during the testator's life, but clearly pointed to survivorship whenever it should occur; and that the surviving son was as such survivor entitled to the estate conveyed by the clause, subject to the obligation imposed upon him of maintaining his brother's widow and daughter. CHUNILAL PARVATISHANKAR *v.* BAI SAMRATH (1914)

I. L. R. 38 Bom. 399

4. ——— *Will by Hindu—Absolute gift by will to Hindu widow—Property acquired after date of will—Rule of law that will speaks from the death of the testator, before and after the Hindu Wills Act.* A Hindu testator executed a will at Benares in which he provided: "Upon my death my wife shall get the lands, jamas, cash money, Government promissory notes, etc., and all other immoveable and moveable properties of which I am in possession and enjoyment save and except the lands and buildings mentioned in the schedule and possess and enjoy the same with the right to transfer by gift or sale, and no one will be entitled to raise any objection regarding any gift or sale to be made by her." The testator after the date of the will purchased a house at Benares of which he was in possession and enjoyment at the time of his death: *Held*, that the widow did not get merely a widow's estate in the property bequeathed but she took it as an absolute heritable estate. That the Hindu Wills Act did not apply to the property in Benares. That the words "upon my death my wife shall get all my properties of which I am in possession" meant that she was to take all the property which the testator would possess at the time of his death and there was no intestacy so far as the house at Benares was concerned. Section 77 of the Succession Act which is incorporated in the Hindu Wills Act

HINDU LAW—WILL—*concld.*

enacts in other words that the will speaks from the death of the testator. The Hindu Wills Act did not vary the mode of construction of wills in this respect nor is it correct to hold that in parts of India, where the Act does not apply, the ordinary rule that the will speaks from the death of the testator does not obtain. JITENDRA KUMAR CHATTOPADHYA *v.* NRITYA GOPAL MUKHOPADHYA (1912) . . . . . **18 C. W. N. 140**

HINDU LAW—WOMAN'S ESTATE.

——— *Female heir, wrongful possession of immoveable property by—Mesne profits, decree for, if may be passed against reversionary heirs—Female heir nominal litigant, one of reversionary heirs conducting defence, effect of.* Where a *darputni* in the possession of a Hindu woman as daughter and heir of a former *darputnidar* was annulled by an auction-purchaser of the *putni* right by notification under s. 167, Bengal Tenancy Act, but she refused to vacate the land: *Held*, that this was a personal tortious act on her part and not an act done by her as representing the estate and for the benefit of that estate, and a decree for mesne profits for the period, she was in wrongful possession, could be made only against her personal estate which passed on her death to her heirs and not against the estate in the hands of the reversionary heirs. *Held*, further, that the fact that one of her sons who were the reversionary heirs carried on the litigation on her behalf, and that she was merely a nominal defendant was not sufficient to convert the act into anything different from a tortious act for which she was personally liable. *Katama Natchiar* v. *The Raja of Shivagunga, 9 Moo. I. A. 539, Hari Nath Chatterjee* v. *Muthur Mohan Goswami, I. L. R.* 21 Calc. 8, *Grish Chunder Lahiri* v. *Shoshi Sekhareshur Roy*, I. L. R. *27 Calc. 951, 957*, and *Harihar Pershad* v. *Bholi Pershad, 6 C. L. J. 383, Lalji Sahaya Singh* v. *Kurki Jha, 11 C. L. J. 90*, and *Sadasi Koer* v. *Ram Govind Singh, 14 C. L. J. 91*, referred to. NAFAR CHANDRA PAL CHOWDHRY *v.* KAMINI KUMAR LAHIRI (1912) . . . . **18 C. W. N. 542**

HINDU WIDOW.

See HINDU LAW—ALIENATION.

I. L. R. 36 All. 187

See SPECIFIC RELIEF ACT (I OF 1877), s. 42.

I. L. R. 36 All. 126

HUNDI.

See EVIDENCE ACT (I OF 1872), s. 91.

I. L. R. 36 All. 259

HUSBAND.

——— **complaint by—**

See COMPLAINT. **I. L. R. 41 Calc. 1013**

HUSBAND'S ESTATE.

——— **accumulations of income of—**

See HINDU LAW—STRIDHAN.

I. L. R. 41 Calc. 870

HUSBAND'S PETITION.

See DIVORCE. . I. L. R. 41 Calc. 963

I

IDENTIFICATION.

See CONSPIRACY. I. L. R. 41 Calc. 754

See IDENTITY.

IDENTITY.

——— evidence of—

See CONSPIRACY. I. L. R. 41 Calc. 754

IJARA.

——— beneficial to Estate—

See HINDU LAW ALIENATION.

I. L. R. 41 Calc. 793

IMAGE.

——— destruction of—

See HINDU LAW—ENDOWMENT.

I. L. R. 41 Calc. 57

IMMOVEABLE PROPERTY.

See CRIMINAL PROCEDURE CODE, S. 517.

18 C. W. N. 1146

IMPARTIBLE ESTATE.

See HINDU LAW—IMPERTIBLE ESTATE.

IMPORTATION.

See COCAINE. I. L. R. 41 Calc. 537

IMPROVEMENTS.

See BUSTEE LAND.

I. L. R. 41 Calc. 104, 164

See MADRAS ESTATES LANDS ACT (MAD. I OF 1908), SS. 3 (7), 6. I. L. R. 37 Mad. 1

——— compensation for—

See SPECIFIC PERFORMANCE.

I. L. R. 41 Calc. 852

INAM LANDS.

——— *Regulation XVI of 1827—Bombay Act XI of 1843, s. 2—Summary Settlement Act (Bom. Act II of 1863), s. 12—Hereditary Offices Act (Bom. Act III of 1874)—Civil Procedure Code (Act V of 1908), ss. 11 and 15—Service inam land—Summary settlement—Alienation—Will—Probate—Decision of Probate Court not to be destroyed by adjudication in a regular suit—Res judicata.* The title of the family of Navalgund Desai came into existence in the time of the Bijapur Monarchs in the 17th century. The Desai was the chief revenue officer of the district under both the Mahomedan rule and the Maratha rule which followed it. The services of the Desai as revenue officer were not made use of during the British rule and he was informed in 1848 by the Collector, under the provisions of s. 2 of Bom. Act XI of 1843, that his services as a revenue officer would not be required

INAM LANDS—*contd.*

of him. As the result of inquiry regarding claims to inam lands, the Desai for the time being was offered the option of commuting his service by payment of an annual sum in the nature of a quit-rent for the lands which he held up to that time on a service tenure, or by occasional payments in the nature of fines, both which classes of pay-ments were styled "Nazarana." In the year 1862 the Government passed a Resolution No. 455, sanctioning the treatment of the Navalgund Desai's *potgee* (allowance) as a personal holding continuable to the holder on the terms of the summary settlement and the Desai consequently accepted the settlement on the terms that the commutation payment should be in the nature of an annual "Nazarana" or quit-rent. Lingappa Sar Desai, the last male member of the Desai family, made a will prohibiting his widow from making an adoption and bequeathing the whole of his property to charity. The will was propounded for probate in the District Court of Belgaum and was duly admitted to probate and the grant of the probate was confirmed by the High Court in appeal. The widow of Lingappa made an adoption and she and the adopted son brought the present suit for a declaration that the testator had no power to make a will and to alienate the property which being service inam was inalienable. *Held*, that the settlement of the Navalgund Desai of the year 1862 was a settlement valid and binding upon Government, that under the settlement the Desai was no longer liable to render any service in respect of the lands held by him and they were, therefore, no longer held upon service tenure and that the possession of lands as service lands for 200 years in the absence of any evidence as to family custom could not impress them with the character of inalienability. *Held*, further, that where service has been commuted for a quit-rent, if the donee's descendants should continue to pay the rent, the tenure would be altered from service to rent, that in the case of service land, which in practice at all events was not usually alienated, it would be difficult to establish a family custom which should have any effect, as distinct from the ordinary incidents of a service tenure, and evidence that land had remained in a family for a long period of years and had descended by the rule of primogeniture where it was service land, would be more consistent with the fact of its having been held for service than with the theory of any special family custom and that when service had come to an end the last holder, if he had no sons or co-sharers, could put an end to a tenure based upon family custom, and that the lands might be treated as the property of an ordinary Hindu land owner subject to the payment of the agreed quit-rent to Government and in the absence of co-parceners the owner could dispose of the lands by will. *Held*, further, that under section 11 of the Code of Civil Procedure it was not open to the Court, after the decision of the District Court granting probate of the will, to try the question of the authority of the widow

INAM LANDS—*concld.*

to adopt, which question was bound up with the question of the revocation of the will in the present suit, inasmuch as the issue decided by the Probate Court had conclusively determined between the parties the question of whether or not the testator had revoked his will before death and whether the statement that he had given authority to his widow to adopt expressed his wishes at the time of his death, and inasmuch as the District Court which had tried the probate case was a Court competent to have tried the present case. BRENDON *v.* SUNDARABAI. (1913)

I. L. R. 38 Bom. 272

INCOME-TAX COLLECTOR.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), S. 195, CLS. (*b*) AND (*c*).

I. L. R. 38 Bom. 642

INCRIMINATING ARTICLES.

——— **possession of—**

See DACOITY. **I. L. R. 41 Calc. 350**

INDEMNITY.

——— **contract of—**

See ESTOPPEL BY JUDGMENT.

I. L. R. 37 Mad. 270

INDIAN COUNCILS ACT (9 EDW. VII, c. 4).

——— **s. 6—**

See ELECTION. **I. L. R. 41 Calc. 384**

INDIAN INSOLVENCY Act, 1848 (11 & 12 VIC. C. 21).

See INSOLVENCY. **I. R. 41 I. A. 251**

INDIAN STAFF CORPS.

——— **salary of—**

See ATTACHMENT.

I. L. R. 38 Bom. 667

INHERITANCE.

See BURMESE LAW.

I. L. R. 41 Calc. 887

See HINDU LAW INHERITANCE.

INJUNCTION.

See PERPETUAL INJUNCTION.

See TEMPORARY INJUNCTION.

See CIVIL PROCEDURE CODE (1908), O. XXXIX, R. 2 **I. L. R. 38 Bom. 381**

See CIVIL PROCEDURE CODE (1908), O. XL, R. 1 . . **I. L. R. 36 All. 19**

1. ——— *Temporary—Order by Revenue Court, suit for setting aside—Competency of Civil Court to grant injunction—Temporary injunction if may be granted when perpetual injunction not sought for—Civil Procedure Code (Act V of 1908), O. XXXIX, r. 2—Bengal Tenancy Act (VIII of 1885), s. 70.* Although a decree may have been passed by a Revenue Court, when it is under execution in a Civil Court, proceedings may

INJUNCTION—*concld.*

be stayed by the Civil Court if a suit has been brought for declaration that the decree was obtained by fraud or was made without jurisdiction and for a perpetual injunction, to restrain the decree-holder from executing the decree. In granting a temporary injuction, the Court acts in aid of the legal right so that the property may be preserved in *status quo*. Where the plaintiffs sued for a declaration that a certain order by the Revenue Court was without jurisdiction, but did not ask for a perpetual injuction, it was not competent to them to ask for a temporary injunction during the pendency of the suit. JITLAL SINGH *v.* KAMALESWARI PROSAD (1912) . **18 C. W. N. 92**

2. ——— *temporary or permanent, wrongfully obtained—Suit for damages, if lies—Limitation.* No suit lies for damages against a defendant for maliciously and without reasonable and probable cause obtaining a perpetual injunction which has been subsequently dissolved on appeal. A temporary injunction granted in such a suit is *ipso facto* dissolved by the Court's decree granting a perpetual injunction. In a suit for damages in respect of the temporary injunction, limitation would therefore run from the date when the temporary injunction was dissolved by the decree granting perpetual injunction. *Per* FLETCHER *J.* Nothing in the Limitation Act can give a party a right of suit, unless such right exists independent of the Limitation Act. *Nand Kumar Shaha* v. *Gour Sunkur, 13 W. R. 305*, is questionable authority in so far as it decides that a plaintiff can maintain a suit for damages against a defendant for maliciously and without probable cause obtaining an interlocutory injunction. An allegation by the plaintiff that the defendants were actuated by malice and that their suit for perpetual injunction ultimately proved unsuccessful when the decree of the High Court in their favour was set aside by His Majesty in Council was not a sufficient allegation of want of reasonable and probable cause. Want of probable cause is not to be inferred because of mere evidence of malice. *Turner* v. *Ambler, 10 Q. B. 252*, referred to. *Per* RICHARDSON, *J. S.* 95, Civil Procedure Code, seems to contemplate the possibility of a suit being brought to recover compensation in respect of a temporary injunction applied for on insufficient grounds or in a suit instituted without reasonable or probable cause. It is at least doubtful whether such a suit is maintainable in the absence of an undertaking to pay compensation. A party is not liable in damages for procuring an erroneous decision. *Dhurmo Narain* v. *Sreemutty Dossee, 18 W. R. 440*, referred to. MOHINI MOHAN MISSER *v.* SURENDRA NARAYAN SINGH. (1914)

18 C. W. N. 1189

IN PARI DELICTO.

See KHOTI SETTLEMENT ACT (BOM. ACT I OF 1880), SS. 9, 10.

I. L. R. 38 Bom. 709

INSOLVENCY.

See EXECUTION OF DECREE.

I. L. R. 41 Calc. 50

INSOLVENCY—*concld.*

See PROVINCIAL INSOLVENCY ACT (III OF 1907), SS. 5, 6, 15, 16.
I. L. R. 36 All. 250

See PROVINCIAL INSOLVENCY ACT (III OF 1907), SS. 20, 22, 46.
I. L. R. 36 All. 8

———— *Title of Official Assignee —Official Assignee substituted for Judgment Debtors —Execution Sale—Effect of Sale—Indian Insolvency Act, 1848 (11 & 12 Vict. c. 21).* The property of judgment-debtors having vested in the Official Assignee under the Indian Insolvency Act, 1848, judgment-creditors who had previously attached certain part of it obtained an order that notice should issue to the Official Assingee to show cause why he should not be substituted for the judgment-debtors as a party, and this notice was given. Without further notice to the Official Assignee the property attached was sold in execution :— *Held,* that the auction-purchasers obtained no title against the Official Assignee. RAGHUNATH DAS *v.* SUNDAR DAS KHETRI. (1914)
L. R. 41 I. A. 251

INSOLVENCY ACT (III OF 1909)

See PRESIDENCY TOWNS INSOLVENCY ACT.

INSOLVENCY PROCEEDINGS.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), S. 195 (*1*), (*c*).
I. L. R. 37 Mad. 107

INSOLVENT.

See INSOLVENCY.

See PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), SS. 15 (*2*) and 21 (*1*).
I. L. R. 38 Bom. 200

See PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 17.
I. L. R. 38 Bom. 359

See PROVINCIAL INSOLVENCY ACT (III OF 1907), S. 36. **I. L. R. 36 All. 549**

See PROVINCIAL INSOLVENCY ACT (III OF 1907), SS. 43 AND 46.
I. L. R. 36 All. 576

INSTALMENTS.

See CIVIL PROCEDURE CODE (1908), O. XXXIV. **I. L. R. 38 Bom. 32**

INSURANCE.

See CONTRACT ACT (IX OF 1872), S. 28.
I. L. R. 38 Bom. 344

See LIFE INSURANCE.

See MARRIED WOMEN'S PROPERTY ACT (III OF 1874), S. 6.
I. L. R. 37 Mad. 483

———— *Warning that premises would be set on fire—Insurance in consequence of warning—Duty of assured to disclose facts affecting risk and premium—Defective declaration under*

INSURANCE—*concld.*

O. XXX, r. 2, Civil Procedure Code, its effect. It is the duty of a person who receives information or warning that his premises will be set on fire, in consequence of which he insures his premises, to disclose to the insurer the information so received. If he fails to do so, the insurer is discharged from liability. *Greet* v. *Citizens Insurance Co., Tupper's R., (U. C.) 596, C. A.,* followed. *Kelly* v. *Hochelaga Fire Insurance Co., 24 L. Can. Jur. 298,* distinguished. Every circumstance which would influence or be likely to influence the judgment of a prudent insurer in fixing the premium and indetermining whether he will take the risk or not, should be disclosed. There is a duty to disclose to the insurer all facts which bear upon their being a possibility of a fire greater than usual, and which might indicate the motive of the assured in effecting the insurance. There is no obligation on an assured to disclose matters already known to the insurer. A suit need not be dismissed for incomplete disclosure of the names of partners, according to the provisions of O. XXX, r. 2, Civil Procedure Code. It is a defect which may be allowed to be corrected. *Abrahams & Co.* v. *Dunlop Pneumatic Tyre Co., [1905] 1 K. B. 46,* referred to. IMPERIAL PRESSING CO. *v.* BRITISH CROWN ASSURANCE CORPORATION, LD. (1913) . . **I. L. R. 41 Calc. 581**

INTENTION.

See CAUSE OF ACTION.
I. L. R. 41 Calc. 825

See CONSTRUCTION OF DOCUMENT.
I. L. R. 37 Mad. 480

See FORFEITURE.
I. L. R. 41 Calc. 466

INTERCEPTED LETTER.

———— **admissibility of—**

See EVIDENCE. **I. L. R. 41 Calc. 545**

INTEREST.

See CIVIL PROCEDURE CODE (1882), S. 257A . . **I. L. R. 38 Bom. 219**

See CIVIL PROCEDURE CODE (1908), S. 34 O. XXXIV, RR. 2, 4.
I. L. R. 36 All. 220

———— *Arrears of rent—Rate of interest—Evidence, if admissible, to explain kabuliyat.* Where a document recites that interest is to be paid by the tenant upon rent in arrears at the rate of one anna per rupee but does not expressly state whether interest at this rate is payable monthly or annually, evidence is not admissible to show what was really intended. *Monmotha Nath Chaudhury* v. *Nabin Chandra Sanyal, 14 C. W. N. 1100,* discussed. *Mahomed Sumsooddeen* v. *Moonshee Abdul Huq, (1864) W. R. 379,* not followed. Evidence to construe the terms of a contract is not inadmissible in certain cases. PRATAP CHANDRA SHAHA *v.* MAHOMMED ALI SARKAR. (1913) . . . **I. L. R. 41 Calc. 342**

INTERPRETATION, CANON OF.

See REMAND . **I. L. R. 41 Calc. 108**

INTERROGATORIES.

See DISCOVERY . **I. L. R. 41 Calc. 6**

INVENTORY

See COURT FEES AMENDMENT ACT (XI OF 1899), S. 19 H.
I. L. R. 41 Calc. 556

IRREGULARITY.

See CRIMINAL PROCEDURE CODE, SS. 250, 537 . . . **I. L. R. 36 All. 132**

See WITHDRAWAL OF SUIT.
I. L. R. 41 Calc. 632

IRRIGATION ACT (BOM. VII OF 1879).

——————— *District Municipal Act (Bom. Act III of 1901), s. 56—Drainage cut—Drainage channel—Neglect of proper repairs by local bodies—Flow of water across the road into plaintiffs' field—Damage—Liability of local bodies—Non-feasance—Neglect of highways.* Where drainage water passing along a certain drainage cut owing to some default instead of flowing along the assigned channel flowed across the road into the plaintiffs' field and caused damage to the plaintiffs and the damage was found to be due, not to the authorized drainage work but to the neglect of the drainage channel which the Municipality was bound to repair:—*Held*, that the Municipality was liable to the plaintiffs in damages. *Per* CURIAM:—The exemption from liability of local bodies on the ground of non-feasance is confined to neglect of highways and does not apply to drainage works carried out by the local bodies for their convenience, which they are bound to maintain in a proper state of repairs so that they shall not be a nuisance to the neighbouring owners. *Borough of Bathurst* v. *Macpherson*, *L. R. 4 App. Cas. 256*, *Municipality of Pictou* v. *Geldert*, [*1893*] *A. C. 524*, referred to. DHOLKA TOWN MUNICIPALITY v. PATEL DESAIBHAI (1913)
I. L. R. 38 Bom. 116

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JALKAR.

See FISHERY RIGHTS.
L. R. 41 I. A. 221

JOINDER OF CAUSES OF ACTION.

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. II, R. 2.
I. L. R. 38 Bom. 444

JOINT-FAMILY.

See HINDU LAW—JOINT FAMILY.
See KHOJAS . **I. L. R. 38 Bom. 449**

JOINT-FAMILY BUSINESS

——————— *Dissolution and accounts —Private arbitration—Award, operation of, on moneys realised by member on behalf of family—"Cash" meaning of.* The members of a joint-family business referred their disputes (in view of dissolution) to an arbitrator before whom on 31st July 1895 they stated, *inter alia*, that they had divided amongst themselves all the moveables consisting of cash and kind, etc.; that a sum of R5,650 was payable to one of them B; that they had understood the accounts among themselves and that "now no co-sharer has any right to demand accounts from another;" and the arbitrator made his award on 5th August 1895. At the date of the award, there was an undischarged usufructuary mortgage executed on 16th June 1883, for 14 years, by one M in favour of B as representing the family, to be discharged by receipt of the usufruct: *Held*, that the terms and intent of the award precluded the other co-sharers from asking for an account of moneys realised previous to the date of the award. The word "cash" referred to all moneys received by the parties before the statement was made to the arbitrator. SHEO NARAIN SINGH *v.* BISHUNATH SINGH (1913) . . . **18 C. W. N. 426**

JOINT HINDU FAMILY.

See CIVIL PROCEDURE CODE, 1908, O. XX R. 18 . . **I. L. R. 36 All. 4610**

See HINDU LAW—JOINT FAMILY.

See SPECIFIC RELIEF ACT (I OF 1877), S. 42 . . **I. L. R. 36 All. 126**

See SUCCESSION CERTIFICATE ACT (VII OF 1889), S. 4 . **I. L. R. 36 All. 380**

See TRANSFER OF PROPERTY ACT (IV OF 1882), S. 99 . **I. L. R. 36 All. 516**

JOINT POSSESSION.

——————— *suit for, if lies when no ouster—When ouster proved, partition if only remedy—Plea that partition proper remedy, when to be taken.* A suit for joint possession is not maintainable unless there is actual ouster. If it is stated by the defendant in possession that the plaintiff has no right and if he is refused leave to enter the land, it is a case of actual ouster, and a suit for joint possession will lie. SARAT CHANDRA MUKHOPADHYA *v.* RAJENDRA LAL MITRA (1913)
18 C. W. N. 420

JUDGMENT

See CRIMINAL PROCEDURE CODE, SS. 367, 421. . . **I. L. R. 36 All. 496**

——————— *Judgments and orders not inter parties—Res judicata—Estoppel—Evidence—Relevancy.* Plaintiff purchased certain properties at a sale in execution of a money decree against A. A's mother B, whose claim to the property under a kobala alleged to have been executed by the original owner D had been dismissed in execution proceedings also failed in a suit instituted by her against plaintiff and others under S. 283 of the Civil Procedure Code of 1882, it having been found that B was really a benamidar for A. Plaintiff, on proceeding to take possession, was opposed by D.

JUDGMENT—*concld.*

In a suit by the plaintiffs to recover the property from D: *Held*, that the orders and decrees in the previous litigation were relevant to the issue as to title, and though not *res judicata* between the parties were admissible in evidence. *Ramamurti Dhora* v. *The Secretary of State for India, I. L. R. 36 Mad. 141*, referred to. PEARI MOHAN SHAHA *v.* DURLAVI DASSYA (1913) . **18 C. W. N. 954**

JUDGMENT-DEBTOR.

——— **death of—**

See EXECUTION OF DECREE.
I. L. R. 41 Calc. 50

——— **representative of—**

See APPEAL. **I. L. R. 41 Calc. 418**

JUDICIAL COMMITTEE.

——— **functions of, in criminal cases—**

See PRIVY COUNCIL, PRACTICE OF
I. L. R. 41 Calc. 1023

JUDICIAL DECISIONS.

——— **application of—**

See SANCTION FOR PROSECUTION.
I. L. R. 41 Calc. 446

JURISDICTION.

See CIVIL AND REVENUE COURTS.

See HIGH COURT, JURISDICTION OF.

See ARBITRATION . **I. L. R. 36 All. 354**

See CIVIL COURTS ACT (BOM. XIV OF 1869), S. 32 . **I. L. R. 38 Bom. 662**

See CIVIL PROCEDURE CODE (1908), S. 20(*c*).
I. L. R. 36 All. 563

See CIVIL PROCEDURE CODE (1908), O. XXI, R. 7 . **I. L. R. 38 Bom. 194**

See CIVIL PROCEDURE CODE (1908), O. XLVII, R . **I. L. R. 38 Bom. 416**

See CRIMINAL PROCEDURE CODE, SS. 112, 167 . . **I. L. R. 36 All. 262**

See CRIMINAL PROCEDURE CODE, S. 133.
I. L. R. 36 All. 209

See CRIMINAL PROCEDURE CODE, SS. 145, 435 . . **I. L. R. 36 All. 233**

See CRIMINAL PROCEDURE CODE, S. 203.
I. L. R. 36 All. 129

See CRIMINAL PROCEDURE CODE, SS. 350, 528 . . **I. L. R. 36 All. 315**

See CRIMINAL PROCEDURE CODE, S. 437.
I. L. R. 36 All. 53

See DIVORCE ACT (IV OF 1869), SS. 2, 4, 7 AND 45 . . **I. L. R. 38 Bom. 125**

See EXECUTION OF DECREE.
I. L. R. 36 All. 33

See EXTRADITION **I. L. R. 41 Calc. 400**

See MINOR—GUARDIAN.
L. R. 41 I. A. 314

JURISDICTION—*contd.*

See MORTGAGE . **I. L. R. 37 Mad. 420**

See PENAL CODE ACT (XLV OF 1860), SS. 182 AND 211.
I. L. R. 36 All. 212

See REGISTRATION
I. L. R. 41 Calc. 972

See SALE IN EXECUTION OF DECREE.
I. L. R. 41 Calc. 590

——— **of Civil and Revenue Courts,—**

See AGRA TENANCY ACT (II OF 1901), SS. 95 AND 167. **I. L. R. 36 All. 48**

See AGRA TENANCY ACT (II OF 1901), S. 167, SCH. IV, GROUP C, NO. 30.
I. L. R. 36 All. 55

——— **in suit for maintenance—**

See PARSIS. . **I. L. R. 38 Bom. 615**

1. ——— *Sonthal Parganas—Suit to enforce Mortgage—Land partly in Sonthal Parganas—Usury—Sonthal Parganas Act (XXXVII of 1855), s. 2—Sonthal Parganas Settlement Regulation (Beng. III of 1872), ss. 5 and 6—Sonthal Parganas Justice Regulation (Beng. V of 1893), Part II—Civil Procedure Code (XIV of 1882), s. 19.* A suit was brought in 1904 in the Court of the Subordinate Judge at Bhagalpur to enforce a mortgage of land, of which a portion was situate in the Sonthal Parganas (a part only of that land having been settled) and a portion in the Bhagalpur district. The mortgage provided that it might be enforced in the Bhagalpur Court:—*Held*, (i) that all suits in regard to land in the Sonthal Parganas, so long as the land has not been settled and the settlement notified in the *Calcutta Gazette*, must be brought before the settlement officers or the Courts of officers appointed under the Sonthal Parganas Act, 1855, and the Sonthal Parganas Justice Regulation, 1893, and that the Bhagalpur Court had no jurisdiction in the present suit under the Code of Civil Procedure, 1882, s. 19, or otherwise; (ii) that the Court exercising jurisdiction to enforce the mortgage was bound by the rules as to usury contained in s. 6 of the Sonthal Parganas Settlement Regulation, 1872. MAHA PRASAD *v.* RAMANI MOHAN SINGH (1914)
L. R. 41 I. A. 197

2. ——— *Trial—High Court—Power to determine venue when several Courts have concurrent local jurisdiction—Absence of any doubt as to which Court has such jurisdiction—Interference on the ground of convenience only—Criminal Procedure Code (Act V of 1898), s. 185.* Section 185 of the Criminal Procedure Code does not warrant the High Court, within the local limits of whose criminal jurisdiction the offender actually is, in interfering thereunder merely on the ground of convenience, but only when a doubt arises as to the Court by which an offence should be enquired into or tried. Where, therefore, there is no doubt that two Courts are equally competent to exercise jurisdiction, the High Court has no power under the section. RAJANI BENODE

JURISDICTION—*contd.*

CHAKRAVARTI *v.* ALL INDIAN BANKING AND INSURANCE CO. (1913) . **I. L. R. 41 Calc. 305**

3. ——— *Additional Sessions Judge, competency of, to try suit under s. 92 of the Civil Procedure Code, 1908, if not directly empowered by Local Government—Civil Procedure Code (Act V of 1908), ss. 24, 92—Bengal N. W. P. and Assam Civil Courts Act (XII of 1887), s. 8.* An Additional District Judge, who is not vested with the power of trying suits under s. 92 of the Code of Civil Procedure by the Local Government, has no jurisdiction to try such suits, and a transfer of such a suit by the District Judge to the Additional District Judge is not competent. *Abdul Karim Abu Ahmed Khan* v. *Abdus Sobhan Chowdhry, I. L. R. 39 Calc. 146* referred to. MAHOMED MUSA *v.* ABUL HASSAN KHAN (1914)

I. L. R. 41 Calc. 866

4. ——— *Execution of decree —Ejectment—Indian High Courts Act, 1861 (24 & 25 Vict. c. 104) s. 15—Bengal, Assam Civil Courts Act, (XII of 1887), s. 21—Sonthal Parganas Civil Courts Statutory Rules, paragraph 29—Sonthal Parganas Act, (XXXVII of 1885), s. 1, cl. (2), s. 2—Sonthal Parganas Settlement Regulation (III of 1872)—Sonthal Parganas Rent Regulation (II of 1886), s. 25—Sonthal Parganas Justice Regulation (V of 1893), ss. 7, 9, 12, 14, 15, 27.* Where the decree-holder applied for execution of a rent decree by ejectment, as previous applications for attachment and sale had failed, and the Sub-Deputy Collector of Deoghar ordered the ejectment of the judgment-debtor from a *portion* of the holding, but the Deputy Commissioner on the recommendation of the Sub-Divisional Officer sanctioned eviction from the *whole* holding, and as the suit for rent was valued at less than one thousand rupees, though the market value of the land was more :—*Held*, that the suit was rightly tried in the Court of the Sub-Deputy Collector, and the execution proceeding was properly commenced in the Court in which the suit had been brought and the decree made. *Held*, also, that in relation to that Court, the Court of the Commissioner was the High Court (*vide* s. 15 of Regulation V of 1893), and not this High Court. Though the same individual may be appointed to discharge the duties of Sub-Divisional Officer and Subordinate Judge or Deputy Commissioner and District Judge, and in one set of Courts be subject to the superintendence of this High Court, still the two sets of Courts as institutions or tribunals were entirely distinct from each other. *Abdul Karim* v. *The Municipal Officer, Aden, I. L. R. 27 Bom. 575, Municipal Officer, Aden* v. *Ismail Hajee Allana, I. L. R. 30 Bom. 246, Rhimbai* v. *Mariam, I. L. R. 34 Bom. 267, In the matter of John Thomson, 6 B. L. R. 180 ; 14 W. R. 257*, distinguished. *Golam Najaf Miah* v. *Panchanan Gupta, 19 C. L. J. 292*, followed. *Held*, further, that s. 25 of Regulation II of 1886 was framed for the protection of the raiyat. If the execution Court determined that the decree was to be executed by ejectment, that order was not to be carried out until it had been sanctioned by the Deputy Commissioner, and even then there need be no ejectment if the decree was satisfied. It could never have been intended that the scope of the order as made by the execution Court should be widened by the Deputy Commissioner, as had been done in the present case, and that without any notice to the raiyat. DARBARI PANJARA *v.* BHOTI ROY (1814)

I. L. R. 41 Calc. 915

5. ——— *Civil Courts—Taxes levied by cantonment authorities—Payment under protest—Jurisdiction of Civil Courts to entertain suit for recovery of payment.* Civil Courts have jurisdiction to entertain a suit to recover the amount of taxes levied by the cantonment authorities and paid under protest on the ground that the assessment was illegal. This may be the case both when a serious demand requiring very attentive consideration had been made on the plaintiffs and reasonable time has not been given to the latter to take advice on the subject and when the cantonment authorities have wholly disregarded the basis on which the rate should have been assessed, by assessing the rate upon the gross income of the plaintiffs. *Kasandas* v. *Anklesvar, I. L. R. 26 Bom. 294*, followed. SECRETARY OF STATE FOR INDIA *v.* MAJOR HUGHES (1913)

I. L. R. 38 Bom. 293

6. ——— *Transfer of venue from one Court to another after decree— Appellate forum.* The District Munsif of Madanapalle having jurisdiction over Kadiri, passed a decree on 30th March 1911 in respect of a cause of action which arose in Kadiri on 1st April 1911. Kadiri was transferred to the territorial jurisdiction of the District Munsif's Court at Penukonda, from which appeals lay to the District Court at Bellary, whereas appeals from the District Munsif's Court at Madanapalle lay to the District Court at Cuddapah. *Held*, on the question as to the proper appellate forum in the case, that the appeal from the decreee lay to the District Court at Bellary, as the transfer of territorial jurisdiction *ipso facto* effected a transfer of venue. SUBBAYYA *v.* RACHAYYA. 1914)

I. L. R. 37 Mad. 477

7. ——— *Objection to, taken at a late stage when entertainable.* Where, exception being taken to the Court's jurisdiction to entertain a suit, an issue was raised, but the objection was over-ruled and on appeal to the High Court the defendant did not raise the question, but did so before the Judicial Committee : *Held*, that inasmuch as the question was one of jurisdiction and it did not depend on disputed facts, the Judicial Committee could not decline to entertain it, specialy as it necessarily presented itself in argument. MAHA PROSAD SINGH *v.* RAMANI MOHAN SINGH (1914) . . . . . **18 C. W. N. 994**

8. ——— *Objection by defendant to —Defendant, if acquiesces by not applying for transfer.* A defendant who takes exception to the jurisdiction of the Court, is not bound to apply for a transfer of the suit to the proper Court,

JURISDICTION—*concld.*

and does not acquiesce in the trial of the suit by not so applying. RATAN CHAND DHARAM CHAND *v.* SECRETARY OF STATE FOR INDIA (1914)
18 C. W. N. 1340

JURY.

See CRIMINAL PROCEDURE CODE, S. 282.
I. L. R. 36 All. 481

See JURY, TRIAL BY.

——— **power to question as to the reasons for verdict—**

See VERDICT OF JURY.
I. L. R. 41 Calc. 621

JURY, TRIAL BY.

——— *Misdirection—Trial by Jury—Misdirection in charge to Jury—Questions of fact, Judge's expression of opinion in dogmatic and unqualified terms —Material evidence, omission to refer to —Conditions precedent to using certain evidence and drawing adverse inference against accused, omission to point out—Absconding not incompatible with innocence, omission to point out —Re-trial by a new Judge.* Where the accused was convicted under ss. 304, 328 of the Penal Code, for having administered arsenic mixed with sugar to two boys and thereby caused the death of one and hurt to the other, and the Sessions Judge in his charge to the jury expressed his own opinion on the evidence in terms too dogmatic and unqualified, although he informed them that on questions of fact they were not bound by any opinion of his, and omitted to refer to some statements of one of the two boys before the Committing Magistrate and before the Sessions Judge and did not warn the jury that before drawing inferences against the accused they must first be satisfied that he knew of the presence of arsenic in the sugar and that the evidence negatived the possibility of accident or mistake, and that before using the Chemical Examiner's report they must be satisfied on the evidence that the substances examined were in fact what they were said to be, and in discussing the question of accused's absence from his village did not warn the Jury that even if they believed that he absconded, absconding is not necessarily or invariably incompatible with innocence: *Held*, that the charge to the Jury was vitiated by misdirection. The High Court set aside the conviction and sentence and ordered a retrial by a new Judge on the ground that the trying Judge had formed a strong opinion on the case. OFEL MOLLAH *v.* THE KING-EMPEROR (1913). . . . . **18 C. W. N. 180**

JUS TERTII.

——— *Suit in ejectment.* The defendant in ejectment might set up and prove *jus tertii*. The defendant is entitled to rely on the *jus tertii* appearing from the facts adduced by the plaintiff to defeat his claim. SITARAM BHIMAJI *v.* SADHU. . . . **I. L. R. 38 Bom. 240**

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KABULIYAT.

See INTEREST. **I. L. R. 41 Calc. 342**

See LANDLORD AND TENANT.
I. L. R. 41 Calc. 493

KAZIS ACT (XII OF 1880).

——— **ss. 2 and 4**—*Kazi not entitled to any exclusive right to officiate as such.* The appointment of a person as Kazi under the Kazis' Act (XII of 1880) does not confer on the appointee any exclusive franchise or any exclusive right to perform the functions of his office. Where, therefore, the plaintiff, a Kazi appointed under the Act, sued the defendant to restrain him from officiating at marriages, and for the recovery of sums of money received by the latter as fees for *nikkas* performed by him: *Held*, that the suit must fail, as the plaintiff had no right to restrain any person from discharging any of the functions of a Kazi. *Muhammad Yussub* v. *Sayad Ahmed, 1 Bom. H. C. R. Appx., 18*, distinguished. *Sayad Hashim Saheb* v. *Huseinsha, I. L. R. 13 Bom. 429, Mira Mohidin* v. *Asan Mohidin, 17 Mad. L. J. 421, Bhoolwa* v. *Syud Unwur Ulee, (1859) N. W. P., S. D. A. 127*, and *Zeenutoollah Cazee* v. *Nujeeboollah, 1835 6 Ben. S. D. A. 31*, referred to SHEIK UMMAR *v.* BUDAN KHAN (1914).
I. L. R. 37 Mad. 228

KHOJAS.

——— *Hindu law, how far applicable to Khojas—Joint family—Presumption as to membership of joint family—Mahomedan law —Spes successionis, transfer of—Family arrangement in the nature of a partition, reasonableness of—Limitation Act (IX of 1908), Articles 91 and 127.* In the year 1879 one D, a Khoja, was living at Malad in the Thana District, where he carried on a small business, together with, *inter alia*, his mother and unmarried daughter, his sons A and I and A's wife and A's son J. In that year it was agreed that A should separate from the rest of the family and should receive what was considered to be his share in the family property. The family property was valued at Rs. 4,500 and Rs. 900 or the fifth part of it was made over to *A* or the members of his family as his share, namely, Rs. 400 in cash given to *A*, ornaments of the value of Rs. 200 given to *A*'s wife and a house of the value of Rs. 300 settled on *J*. The terms of this transaction were contained in a deed of release dated the 13th of February 1879, by which deed *A* released all claims of himself and his wife and son against the family and family property. Subsequently *I* by himself or assisted by his father *D* continued to carry on business and acquired a considerable amount of property. After the release, *A* lived in the house given by the release to his son *J* and some 12 or 13 years after the release another son was born to *A*, namely *X*. *J* and *X* at times lived with their grandfather *D* and their uncle *I* and received assistance from them in various ways, in particular their marriage and other

KHOJAS—*contd.*

ceremonies being performed from *D*'s house and at his expense. *J* and *X* were at times also employed by *D* and *I* in their business for wages. In the year 1902, *D* made a gift to *I* of his property at Malad reserving about Rs. 7,000 to himself. *J* and *X* filed the present suit. In their plaint they stated that the release of the 13th of February 1879 was not valid or binding as having been obtained by fraud, undue influence, etc., and also because it had not been acted upon. They prayed, *inter alia*, for a declaration that the abovementioned business and properties were the properties and business of an undivided family, that the rights of the plaintiffs and defendants therein might be ascertained and declared, that the properties might be partitioned between the plaintiffs and defendants in accordance with their interests so ascertained and declared, that all necessary accounts might be taken, that a receiver might be appointed, that *D* and *I* might be restrained by injunction from alienating the properties, that it might be declared that the release of the 13th of February 1879 was not valid and binding on the plaintiffs and *A* and that it might be declared that the deed of gift of the 8th of October 1902 was void and of no effect as against the interests of the plaintiffs and other members of the joint family. *D* and *I* filed written statements denying the allegations as to fraud, etc., and asserting that the release of the 13th of February 1879 had been acted on. It was assumed in the pleadings that the parties were governed by the Hindu law of the joint family. *Held*, that, as to the law governing Khojas the proper way to approach the question was as follows :—(i) Where Mahomedans were concerned the invariable and general presumption was that they were governed by the Mahomedan law and usage and that it lay on a party setting up a custom in derogation of that law to prove it strictly. (ii) But that in matter of simple succession and inheritance it was to be taken as established that succession and inheritance among Khojas and Memons were governed by Hindu law "as applied to separate and self-acquired property." *Held*, accordingly, that the plaint disclosed no cause of action at all unless the plaintiffs had alleged and were prepared to prove two or three salient features of the Hindu law of the joint family as customs adopted by the Khojas of Bombay as the question involved in the suit did not really arise on a plea of simple succession and inheritance and that there had been no allegation of custom and no attempt had been made to prove a custom and in any case many of the prayers in the plaint were on the face of them bad as the plaintiffs could not have the declaration asked for as to the nature of the property and their rights therein not sue for partition. *Held*, further, that assuming this to have been a joint family under Hindu law when *A* passed the release of the 13th of February 1879, he went out of the family and purported to take out of it his wife and infant son, that the plaintiffs could not dispose of the release as void under Mahomedan law as the mere transfer of a *spes successionis* as

KHOJAS—*concld.*

under Mahomedan law the plaintiffs had no cause of action and that *X*, having been born after his father *A* had gone out of the family, from the point of view of members of the joint family did not exist. *Held*, further, that it could not be inferred from the facts that their grandfather and uncle had kept the plaintiffs, educated them, and got them married, etc., that the plaintiffs thus became members of a joint family, that what was to be looked at in estimating the reasonableness of such family arrangements as the release of the 13th of February 1879 (under Hindu law) was not the state of the family fortune on the day it was called in question but at the time it was made and that if there was then an adequate motive the Court would not scrutinize too closely the adequateness of the consideration. *Ramdas* v. *Chabildas, 12 Bom. L. R. 621*, applied. *Semble :* Where the existence of a document if valid and binding on a party would defeat his suit to recover possession of any property, he must sue under Article 91 of the Limitation Act for the cancellation of the document and that if he does not take steps in time to remove what else will be a bar to the success of his suit, he cannot surmount that bar during the trial by exactly the attack he ought to have made on it directly and within the shorter period allowed by the law of limitation. *Semble* : Article 127 of the Limitation Act does not apply to Mahomedans as such or to Khojas and Memons except where the property is shown to have gone through one unimpaired descent and thereafter to have been held by the survivors as joint family property. *Wasantrao* v. *Anandrao, 6 Bom. L. R. 925*, considered. *Semble* : also, since no Khoja son can enforce a partition it follows that he cannot be a co-sharer. *Ahmedbhoy Hubibbhoy* v. *Cassumbhoy Ahmedbhoy, I. L. R. 13 Bom. 534* and *Rani Sartaj Kuari* v. *Rani Deoraj Kuari, L. R. 15 I. A. 51*, considered. JAN MAHOMED *v.* DATU JAFFER (1913) . **I. L. R. 38 Bom. 449**

KHOTI SETTLEMENT ACT (BOM. I OF 1880).

——— **ss. 9, 10**—*Khoti Takshim—Resignation of occupancy rights—Transfer—Lease for a term of years—Expiration of the lease—Suit to recover possession—Impeachment of plaintiff's title—Consent of khots necessary for transfer—Resignation accompanied by consideration—Parties in pari delicto—Estoppel.* The defendant resigned his occupancy rights in a khoti takshim to the plaintiff, who was one of the khots, in the year 1905. Synchronously with this resignation a lease for a term of five years was executed and the defendant attorned to the plaintiff in respect of the lands. The defendant's resignation was accompanied by consideration. After the expiration of the term of the lease, the plaintiff sued to recover possession of the lands and the defendant impugned the plaintiff's title. *Held*, dismissing the suit for recovery of possession, that the foundation of the plaintiff's title in 1905 was illegal, that the resignation and lease having been made at the same time and having formed part of what was virtually

KHOTI SETTLEMENT ACT (BOM. I OF 1880)— *concld.*

———— ss. 9, 10—*concld.*

one transaction, if the transfer which the resignation was held to amount to were tainted with any illegality as being in contravention of the statute law, namely, the Khoti Settlement Act (Bom. Act I of 1880), the letting must go with it, that under section 9 of the said Act the consent of the khots including the plaintiff was necessary to the validity of the transfer and it was not shown that such consent had been obtained, that accordingly the conditions stated in s. 9 being not complied with there was no transfer under that section, nor could the transaction be regarded as a resignation under s. 10 of the said Act because it was accompanied by consideration. *Held*, further, that in the case of a contract where both the parties were *in pari delicto* the plaintiff was not entitled to estop the defendant from showing the illegality of his title, nor was there any estoppel against any Act of Parliament or in India against an Act of the Legislature. SHRIDHAR BALKRISHNA *v.* BABAJI MULA (1914) **I. L. R. 38 Bom. 709**

KHOTI TAKSHIM.

See KHOTI SETTLEMENT ACT (BOM. I OF 1880), SS. 9, 10.
I. L. R. 38 Bom. 709

KIDNAPPING.

See KIDNAPPINGFROM LAWFUL GUARDIANSHIP.

———— *Removal by the mother of her child from the custody of the father after decree nisi delivering custody to him—Absence of prayer in divorce petition for custody, and of subsequent application therefor—Ex parte decree—Submission of decree to High Court for confirmation—Order of custody part of the decree—Time of operation of order of custody—Divorce Act (IV of 1869), ss. 17, 43, 57—Penal Code (Act XLV of 1860), s. 363.* Where the plaint in a divorce suit did not contain a prayer for custody of the child and there was no subsequent application therefor by the husband, but the District Judge passed an *ex parte* decree *nisi* and included in it, as one of its terms, a direction, without notice to the wife, to deliver her child to the father, and submitted the decree to the High Court for confirmation; and where the father subsequently obtained custody of the child but she took it away from his house, and was charged with kidnapping:—*Held*, that the Judge's direction as to the custody of the child was not intended to be an *ad interim* order under s. 43 of the Divorce Act, which was to take effect immediately, but formed an integral part of the decree and did not operate till confirmation by the High Court, and that she had, therefore, committed no offence punishable under the Penal Code. *Ledlie*, v. *Ledlie, I. L. R. 18 Calc. 473*, referred to. BORTHWICK, *v.* BORTHWICK (1913)
I. L. R. 41 Calc. 714

KIDNAPPING FROM LAWFUL GUARDIANSHIP.

See PENAL CODE (ACT XLV OF 1860), S. 363. **I. L. R. 37 Mad. 567**

KING'S BENCH, COURT OF.

See CONTEMPT OF COURT.
I. L. R. 41 Calc. 173

KULACHAR.

See BABUANA AND SOHAG GRANTS.
L. R. 41 I. A. 275

KUMAUN.

———— land tenures of—

See CIVIL PROCEEDURE CODE (1908) S. 100.
I. L. R. 36 All. 256

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LAKHIRAJ LAND.

See RENT-FREE HOLDING.
18 C. W. N. 1206

———— *Lakhiraj or rent-free holding, grant of, if valid—"Lakhiraj," meaning of—"Belagan," meaning of—Record-of-rights, entries of holdings in, as "belagan" and "kabillagan," effect of—Presumption from long and uninterrupted non-payment of rent, that holding "lakhiraj."* The word "belagan" means simply "not paying agricultural rent" and does not imply anything as to liability to pay rent, whilst the word "kabillagan" indicates a tenancy for which rent is not actually paid, but which is liable to pay rent. Where in respect of a holding entered in the record-of-rights as "belagan" the District Judge presumed, from evidence of long and uninterrupted possession without payment of rent, a grant of land under conditions which make it rent-free: *Held*, that the District Judge was entitled to make that presumption and his determination in no way conflicted with the entry in the record-of-rights. There can be a rent-free grant of permanently settled land and such a grant cannot be treated as a nullity by the grantor or his heirs or by any person claiming through him. *Mohamed Akil* v. *Asadunnissa Bibi, 9 W. R. 1*, referred to. KESHWAR BHAGAT *v.* SHEO PROSAD LAL (1913)
18 C. W. N. 913

LAMBARDAR.

See AGRA TENANCY ACT II OF 1901, S. 194.
I. L. R. 36 All. 44

LAND ACQUISITION.

See LAND ACQUISITION ACT.

———— *Bustee Land—Valuation, principle of—Calcutta Municipal Act (Beng. Act III of 1899), s. 557, sub-ss. (c), (d)—Market value—Inadmissibility of evidence with regard to sales of other lands in the neighbourhood—Land Acquisition Act (I of 1894), ss. 6, 23.* When a land

LAND ACQUISITION—*concld.*

is compulsorily acquired, any use to which the land may be put in future should not be taken into consideration in determining its value. The valuation should be according to the market-value at the time of the acquisition. Sub-s. (*c*) of s. 557 of the Municipal Act precludes evidence being given of other purposes to which *bustee* land can be put in future. Evidence, relating to the under-tenants and rents paid by them, is not relevant for the purpose of ascertaining the market-value as defined by sub-s. (*c*) of s. 557 of the Municipal Act. *Harish Chunder Neogy* v. *Secretary of State for India, 11 C. W. N. 875,* followed. MANINDRA CHANDRA NANDI *v.* SECRETARY OF STATE FOR INDIA (1914). . . . **I. L. R. 41 Calc. 967**

LAND ACQUISITION ACT (I OF 1894).

1.———— *Compulsory acquisition of land for quarrying purposes—Special adaptability for quarrying is element for consideration—Compensation.* Where a piece of land is compulsorily acquired by Government for quarrying purposes, its special adaptability for quarrying is an element for consideration in fixing the amount of compensation. DAYA KHUSHAL *v.* ASSISTANT COLLECTOR, SURAT (1913). . . **I. L. R. 38 Bom. 37**

2.———— *Noabad Mehal property, acquisition of—Apportionment of compensation between Government and claimant—Basis of calculation of value of Government interest—Chance of enhancement of rent, value of.* A Noabad Mehal held under Government implies a hereditary and transferable title in perpetuity subject to payment of rent for all lands under cultivation. Where certain properties included in a Noabad Mehal held under the Government were acquired under the Land Acquisition Act: *Held,* that the mere fact that the rent was enhancible did not justify the Court awarding half the compensation money to Government, as Government would not in ordinary course increase the assessment unless the assets of the property also increased. That the interest of the Government ought to be measured by capitalising the present rent at 30 years' purchase. JOGESH CHANDRA RAY *v.* THE SECRETARY OF STATE FOR INDIA (1912) **18 C. W. N. 531**

———— **ss. 6, 23.**

See LAND ACQUISITION. **I. L. R. 41 Calc. 967**

———— **s. 7.**

See RAILWAYS ACT (IX OF 1890), S. 7. **I. L. R. 38 Bomb. 565**

———— **s. 54**—*Bombay Civil Courts Act (XIV of 1869), s. 16—Civil Procedure Code (Act V of 1908), s. 96 (1)—Reference to Assistant Judge—Award not exceeding Rs. 5,000—Appeal to the District Judge—Second appeal to the High Court not maintainable.* A reference having been made in accordance with the provisions of the Bombay Civil Courts Act (XIV of 1869) to the Assistant Judge, he tried the reference and made an award under the Land Acquisition Act (I of 1894) which did not exceed Rs 5,000. An appeal was presented against the said award to the District Judge and he having decided the appeal, a second appeal was preferred to the High Court. *Held,* that under section 16 of the Bombay Civil Courts Act (XIV of 1869) the Court authorized to hear appeals from the Assistant Judge's Court where the value of the subject-matter was less than Rs. 5,000 was the District Court and not the High Court, and no second appeal being expressly given by the Act, the (second) appeal to the High Court was not maintainable. AHMEDBHOY HABIBBHOY *v.* WAMAN DHONDU (1913) . . . . **I. L. R. 38 Bom. 337**

LAND ACQUISITION ACT (I OF 1894)—*concld.*

———— **s. 54**—*concld.*

LANDLORD AND TENANT.

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See EJECTMENT **I. L. R. 37 Mad. 281**

1. ADVERSE POSSESSION.

———— *Adverse possession by tenant—Suit for declaration of title to jalkar and injunction against defendants—Plaintiff's title based on durputni lease—Defendants' possession as tenants for 12 years previous to lease—Knowledge, if necessary to constitute possession adverse.* Where the plaintiff sued for a declaration of his title to a certain *jalkar* and for an injunction prohibiting the defendants from catching fish in that *jalkar* and it was admitted that the plaintiff was entitled to an eight annas share of the *jalkar* and the plaintiff claimed the other eight annas share under a *durputni* lease granted to them by one R, the *putnidar* of the said eight annas share, who, it was found, had no possession at the time of granting the lease to the plaintiffs and no knowledge as to who was in actual possession and the defendants proved possession as tenants for 12 years previous to the granting of the lease by R. to the plaintiffs: *Held,* that the defendants by their possession gained title as against all the world and this held good as against the person who was in fact thair landlord, though he did not know, and the defendants' possession was a good answer to the plaintiffs' claim which was equivalent to a claim for *khas* possession. *Ishan Chandra* v. *Ram Ranjan, 2 C. L. J. 125, Ichharam Singh* v. *Nilmoney Bahida, I. L. R. 35 Calc. 470: s. c. 12 C. W. N. 636,* and *Gopal Krishna* v. *Lakhiram, 16 C. W. N. 634,* followed. KALI CHARAN SAHA *v.* DABIRUDDIN AHMED (1913) . . . **18 C. W. N. 654**

LANDLORD AND TENANT—*contd.*

2. EJECTMENT.

——————— *Landlord and tenant—Right of lessee after expiry of lease, to eject a trespasser.* Where a lessee, whose lease had expired prior to suit, sued for possession of the land leased to him, from a trespasser: *Held*, that the expiration of their lease did not necessarily imply the expiration of lessee's right of possession, and the lessee was entitled to a decree for possession as against trespassers *a fortiori* where the landlord acquiesced in plaintiff getting a decree. *Gibbins* v. *Buckland, L. J. 32 Exch.* 156, and *Knight* v. *Clarke, 15 Q. B. D. 294*, referred to. VENKAYYA *v.* SATTEYYA (1914) **I. L. R. 37 Mad. 281**

3. LEASE.

1. ——————— *Lease of land for mining coal—Description in kabuliyat given in bighas and boundaries specified in schedule—Area of land delivered found less than area stated in kabuliyat—Claim to abatement of rent in respect of deficiency—Onus on tenant to prove right to reduction of rent—Construction of kabuliyat—Negotiations leading to contract and other extraneous evidence inadmissible in evidence.* This appeal arose out of a suit for Rs. 23,868 as arrears of rent, cesses and interest under a *mokarari maurasi kabuliyat* dated 3rd December 1894 (1301) executed by the respondent on behalf of himself and his co-sharers (the other respondents) in favour of the predecessor in title of the appellant, for the right of coal mining under "400 bighas of land" in mauzah Dobari in Manbhum (the boundaries of the area leased being specified in a schedule to the *kabuliyat*) at a rental of Rs. 2,800 a year which the *kabuliyat* stated "shall never on any account be varied." The land within the boundaries specified in the schedule was not measured at any time, or if measured it was not shown what the measurement was in bighas. The defence, so far as material, was mainly that the respondents had been given possession of the mining rights under an area less than 400 bighas of land, and were therefore entitled to an abatement of the rent in respect of the deficiency; that by an injunction made in 1902 in a suit brought by the appellant, the rights of the respondents to work coal underneath the land leased to them was restricted to an area of 275 bighas, and they tendered rent at a reduced rate which the appellant refused to accept. The rent had been reduced in 1898 (1305) by the original lessor on the ground that the coal taken out was of inferior quality, and rent had been paid at the reduced rate for 2 years; but the document witnessing the reduction had not been registered, and was therefore inadmissible in evidence. On the construction of the *kabuliyat* the appellant contended that the respondents were entitled only to the coal underneath such quantity of land as was contained within the boundaries given in the schedule; and the contention of the respondents was that they were entitled to the coal underneath the full quantity of 400 bighas of land. Both Courts below found that 400 bighas of land had been demised; but the Subordinate Judge, while finding that the respondents were in possession of only 346 bighas, held that they were not entitled to any abatement of rent in respect of the deficiency. The High Court disregarded the description of the land by boundaries, but found on the evidence in the former suit that the respondents had only been in possession of 275 bighas, and held that they were entitled to a proportionate abatement of the rent fixed by the *kabuliyat*. *Held* (reversing the decrees of the Courts in India), that the question as to what had been demised in 1894 turned on the true construction of the *kabuliyat* which could not be varied by extraneous evidence as to the negotiations which led up to the contract, or by evidence showing that within the boundaries specified in the *kabuliyat* there was not 400 bighas of land. *Held*, further, that there was no reliable and admissible evidence to prove that the original lessor ever bound himself permanently to accept a reduced rent; and the fact that he did so for some years was consistent with the reduction having been a mere voluntary and temporary abatement. It was for the respondents to make out a case for the abatement of the rent, but they had not proved how many bighas were contained in the area of mouzah Dobari within the boundaries specified in the sechedule to the *kabuliyat*, nor had they proved the area in bighas within those boundaries of which they were put in possession. They had not proved, otherwise than by the action of the Subordinate Judge on the former suit in granting an injunction in the form in which it was granted, and by their neglect to appeal from that decree, that they had been deprived of the right to work any coal which otherwise they would have been entitled to work under the demise; and the injunction as granted gave them no right which they could enforce by suit, or of which they could avail themselves as a defence to a suit for the fixed rent; thay had in fact wholly failed to prove any facts which would entitle them to any abatement of the rent fixed by the *kabuliyat*. The tenders based on a reduced rent were therefore not good, and were ineffective; and the appellant was entitled to a decree for the amount sued for, less the costs of the former suit. DURGA PRASAD SINGH *v.* RAJENDRA NARAYAN BAGCHI (1913) **I. L. R. 41 Calc. 493**

2. ——————— *Lease for a term—Clause allowing removal of fixture after expiry of lease, if a renewal clause—Notice of a lease—Notice of terms of a lease—Estoppel—Ouster.* Terms in a lease giving the lessee, if unwilling at the end of the term to take a fresh settlement, the right to take away the fixtures put on the land cannot operate as a covenant under which the lessee could compel the lessor to grant a fresh term. SARAT CHANDRA MUKHOPADHYAY *v.* RAJENDRA LAL MITRA (1913) . . . **18 C. W. N. 420**

3. ——————— *Nim-howla lease stipulation in, against voluntary alienation by tenan*

LANDLORD AND TENANT—*contd.*

3. LEASE—*concld.*

to person other than landlord—Purchase of tenure by stranger at sale in execution of money-decree—Purchaser if acquires good title—Landlord if can sue original tenants for rent and obtain decree binding on tenure. The plaintiff purchased at an execution sale the right, title and interest of the tenants in a *nim-howla* tenure. Notwithstanding the purchase by the plaintiff which was duly notified to the landlord, the latter brought a suit for rent against the tenants and obtained a decree. The plaintiff brought a suit for declaration that this decree was not binding on him and that the tenure in his hands was not liable to be sold in execution thereof. The lease which created the *nim-howla* provided as follows : "Let it be known that if you find it necessary to transfer the *nim-howla* tenure, you will transfer it to me for proper price. You will not be at liberty to transfer it to any person other than myself. If you transfer it to any other person, such transfer will be invalid." *Held*, that there being no covenant against involuntary alienations and no covenant for re-entry, the plaintiff acquired a good title by his purchase and consequently it was not open to the landlord to sue the original tenants with a view to obtain a decree whereby he could proceed against the tenure in the hands of the plaintiff. PROMODE RANJAN GHOSH *v.* ASWINI KUMAR NAG (1914)

18 C. W. N. 1138

4. RENT.

1. ——————— *Owner of patni taluk within zamindari—Diluvion caused by tidal river—Right to abatement of rent under patni lease—Diluviated land part of taluk re-forming in situ—Claim by zamindars and patnidar—Bengal Act VIII of 1869, s. 19—Limitation by adverse possession—Failure to show relinquishment of submerged land by patnidar.* The appellants were owners of a zamindari within which was a patni taluk created in 1837 by one of the predecessors in title of the appellants : this taluk was owned by the first respondent as patnidar, and a strong tidal river flowed close to the boundaries of the taluk. The patni lease covenanted that "if the land be found to be more in measurement by *nal* prevalent according to the custom of the pargana, I shall separately pay the rent thereof at this rate ; if it be found to be less I shall get remission therefor." In 1843 the appellants obtained a decree in the Revenue Court for increased rent on the ground that additional land was found on measurement to be in the patnidars' possession. In 1889 part of the taluk having been washed away by the river, the respondent obtained a proportionate abatement of the rent. Subsequently the land so diluviated re-formed *in situ*, whereupon both parties claimed it, and each party attempted to exercise rights of ownership as evidence of adverse possession against the other : but it was found that neither party had proved sufficient adverse possession to give him a title. In 1906 the appellants sued for a declaration of

LANDLORD AND TENANT—*contd.*

4. RENT—*contd.*

their title to khas possession of the land re-formed on the ground that it was part of their zamindari ; or in the alternative were entitled to receive a proper rent for it. The respondents pleaded that the land was an accretion to their taluk, and that the appellants were only entitled to rent and not to khas possession. *Held*, that the High Court whilst rightly holding that the land re-formed did not come within the provisions of s. 4 of Regulation XI of 1825, and that it could not be claimed by either party as an accretion to his lands, had laid too much stress on the terms of the lease, and the evidence of intention deducible from the proceedings in respect of additional rent and abatement of rent. There was nothing to show that by claiming or accepting remission of rent in respect of land washed away from time to time by the action of the river, the respondent abandoned or agreed to abandon his rights to such land on its re-formation *in situ*. The diluviated land formed part of a permanent heritable and transferable tenure, and until it could be established that the holder of the tenure had abandoned his right to the submerged land, it remained intact. *Hemnath Dutt* v. *Ashgur Sindar, I. L. R. 4 Calc. 894*, dissented from. *Mazhar Rai* v. *Ramgat Singh, I. L. R. 18 All. 290*, followed. ARUN CHANDRA SINGH *v.* KAMINI KUMAR (1913) . . **I. L. R. 41 Calc. 683**

2. ——————— *Decree for rent—Execution of decree—Bengal Tenancy Act (VIII of 1885). ss. 65, 66, 148(h)—Bengal Regulation (VIII of 1819), ss. 8, 11, 13, sub-ss. (2) and (4)—Right to bring tenure to sale in execution of decree for arrears of rent—Assignees of decree.* A zamindar having parted with all his interest in the zamindari, brought a suit for arrears of rent against the patnidar, and obtained a decree. Further arrears became due to recover which the purchaser of the zamindari took proceedings under Bengal Regulation VIII of 1819 (relating to patni tenures), and the darpatnidar deposited the amount of the arrears under s. 13 of the Regulation and was put into possession of the patni tenure. In a suit brought by him for a declaration that he had a first charge on the patni for the sum deposited by him, and for an injunction to restrain the defendants (persons to whom the ex-zamindar had assigned amongst other property, the decree for arrears of rent) from executing the decree : *Held* (reversing the decision of the High Court), that the decree was not one for rent within the meaning of s. 65 of the Bengal Tenancy Act. Ss. 65 and 66 taken together cover practically the remedies provided by law for the landlord to recover arrears of rent. One section is the exact corollary of the other. The right to proceed to sale in one case, in the other to eject, is dependent on the existence of the relationship of landlord and tenant at the time when the remedy provided by law is sought to be enforced. By S. 148(*h*) of the Act the right to apply for the execution of a decree for arrears of rent was attached to the status

LANDLORD AND TENANT—*contd.*

4. RENT—*contd.*

of decree-holder *quâ* landlord. The prohibition contained in that section referred to decrees obtained by the landlord under s. 65, and the right to bring the tenure to sale exists only so long as the relationship of landlord and tenant exists, and appertains exclusively to the landlord. A person, therefore, to whom rents are due and who obtains a decree for them after he has parted with the property in which the tenancy is situate, has no such right. *Khetra Pal Singh* v. *Kritarthamoni Dassi, I. L. R. 33 Calc. 566*, distinguished. *Held*, also, that the plaintiff by his deposit of the arrears for which the patni tenure was advertised for sale at the instance of the purchaser of the zamindari, acquired the special lien expressly created by Regulation VIII of 1819, arising not under any implication of law, but under the express directions and declarations contained in ss. 8, 11, 13, and 13 sub-s. (2) of the Regulation; and the Bengal Tenancy Act is declared by s. 195 of that Act not to affect any enactment relating to patni tenures, "so far as it relates to those tenures." FORBES *v.* MAHARAJ BAHADUR SINGH (1914) . . . **I. L. R. 41 Calc. 926**

3. ——— *Abatement, tenant's claim of — Onus—Tenant deprived of a portion of land by form of injunction, erroneously decreed, in landlord's suit to restrain encroachment by tenant on khas lands—Agreement to take reduced rent, not registered, if admissible—Want of consideration.* The receipt by the landlord of a reduced rent for some years, in the absence of reliable and admissible evidence to prove such an agreement, was held to be consistent with the reduction having been a mere voluntary and temporary abatement. Where after a permanent lease had been executed, the landlord sued the tenant for alleged wrongful entry upon his *khas* land by the tenant and prayed for an injunction to restrain the tenant from committing such trespass, but the Court instead of granting the injunction as prayed decreed that the tenant be restrained from dealing with property lying outside the demised mouzah "as delineated in the map prepared by the Civil Court Amin," and the tenant preferred no appeal against the decree: *Held*, that, it was not intended by that decree to reduce the area of the land which the tenant was entitled to deal with under his lease, and in a suit for arrears of rent he could not claim an abatement of the rent if in fact the injunction, which was granted in wider terms than were called for, had that effect, as he did not avail himself of his remedy by way of appeal and submitted to the decree. Where the tenant tendered a reduced amount of rent and interest, on the plea that owing to his having not been given possession of the entire area demised, he was entitled to an abatement of rent but no ground was made out by the tenant for such abatement, the tender was not a good tender. It is for the tenant to make out a case, if he has one, for an abatement of the fixed rent. DURGA PRASAD SINGH *v.* RAJENDRA NARAYAN BAGCHI (1913) . . . . **18 C. W. N. 66**

LANDLORD AND TENANT—*concld.*

4. RENT—*concld.*

4. ——— *Eviction by title paramount, if good defence to rent suit—Tenant induced to attorn to superior landlord by offer of reduced rent.* Eviction by title paramount would be a good defence to a suit for rent, if the party evicting having a good title, the tenant quitted against his will. The same result would follow where the party seeking to evict should claim the rent and the tenant on such notice attorn to him. *Hill* v. *Saunders, 4 B. & C. 529*, followed. This doctrine of *quasi* eviction should apply in this country but it does not apply to a case where the tenant is induced to attorn to the superior landlord by an offer to accept reduced rent. NOORIJAN SARDAR *v.* BIMOLA SUNDARI GUPTA (1912) **18 C. W. N. 552**

5. ——— *Rent, abatement of—Construction of kabuliyat.* In a *putni kabuliyat* there was the following provision for abatement of rent . . . . 'If you obtain remission in the *sudder jama* from the Government in respect of lands taken up for culverts, embankments or roads, I shall also get from you reduction of *jama* on account of all the said remissions in the *jama* of this *putni*.' *Held*, on a construction of the agreement, that the *putnidar* was to get the same amount of remission which the zamindar would get in the Government revenue. *Held*, also, that the words 'culverts, embankments or roads' in the agreement were illustrative and not exhaustive. HIRENDRA NATH DUTT *v.* HARI MOHAN GHOSH (1914) . . . . **18 C. W. N. 860**

LANDLORD AND TENANT PROCEDURE ACT (BENG. VIII OF 1869).

——— s. 19—

See LANDLORD AND TENANT.
I. L. R. 41 Calc. 683

LAND REGISTRATION ACT (BENG. VI OF 1876).

——— s. 78—*Resumed chaukidari chakran land—Effect of transfer to zemindar—Non-registration under the Land Registration Act, if bar to suit for rent—Village Chaukidars Act (Beng. VI of 1870), s. 51.* Where the plaintiff zemindar claimed rent for land which was originally chaukidari chakran and was upon resumption settled with his predecessor in interest, and the defendant resisted the claim on the ground that the name of the plaintiff was not registered in the books of the Collector under s. 78 of the Land Registration Act of 1876: *Held*, that under s. 51 of the Village Chaukidars Act of 1870, the effect of transfer of resumed chakran lands to the zemindar was not to impart to such land the character of an "estate" for all purposes, and s. 78 of the Land Registration Act was no bar to the plaintiff's suit. TINKARI MUKERJÉE *v.* SATYA NIRANJAN CHAKRABUTTY (1913) . . . . **18 C. W. N. 158**

LAND REVENUE CODE (BOM. ACT V OF 1879).

——— s. 83—*Transfer of Property Act (IV of 1882), s. 108, cl. (h)—Permanent tenant—Right to cut trees—English law of fixtures—No application in this country.* A permanent tenant, the origin of whose tenancy is lost in antiquity and who has planted trees upon the lands demised, has a right to cut them down and to use them. The English law of fixtures and the principles upon which it is based have no applicability in this country. SITABAI *v.* SAMBHU SONU (1914) **I. L. R. 38 Bom. 716**

LAW, QUESTION OF.

——— *Decision that there is no evidence to support finding.* A decision that there is no evidence to support a finding is a decision of law. HARENDRA LAL ROY CHOWDHURI *v.* HARI DASI DEBI (1914) . **18 C. W. N. 817**

LEASE.

See ADVERSE POSSESSION. **I. L. R. 38 Bom. 53**

See BUSTEE LAND. **I. L. R. 41 Calc. 164**

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. II, R. 2. **I. L. R. 38 Bom. 444**

See KHOTI SETTLEMENT ACT (BOM. I OF 1880), SS. 9, 10. **I. L. R. 38 Bom. 709**

See LANDLORD AND TENANT. **I. L. R. 41 Calc. 493**

See LANDLORD AND TENANT—LEASE.

See RENT . . **I. L. R. 41 Calc. 347**

——— *Unexpired term of lease bequeathed to widow—Widow holding over on expiry of lease—Grant by Government to widow of property, the subject of the lease—Nature of estate taken by widow.* A lease of a village in Kumaun was granted by the Government in 1844 for a period of twenty years. The lessee died in 1852, having left his interest in the village (without clearly specifying what it amounted to) to his widow for life and after her to her daughter for life with a reversion in favour of a certain temple. The widow, however, continued in possession of the village down to 1871, when the Government granted her proprietary interest in it, which she subsequently sold. *Held*, on suit for possession after the death of the widow and her daughter by a person claiming as reversioner to the original lessee, that the estate which the widow acquired in 1871 as the grantee of the Government was her own personal estate and not merely an enlargement of the leasehold estate of her husband, and that the plaintiff had consequently no right to succeed. RAJ KISHORE DAS *v.* JAINT SINGH (1914) . **I. L. R. 36 All. 387**

LEAVE OF COURT.

See PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 17. **I. L. R. 38 Bom. 359**

LEAVE TO APPEAL TO PRIVY COUNCIL.

See CIVIL PROCEDURE CODE (ACT V OF 1908), SS. 109, 110. **I. L. R. 38 Bom. 421**

See PRIVY COUNCIL, PRACTICE OF.

LEGAL JUSTICE.

——— as opposed to moral.

See CONTRACT . **I. L. R. 37 Mad. 385**

LEGAL MISCONDUCT.

See ARBITRATION **I. L. R. 41 Calc. 313**

LEGAL NECESSITY.

See HINDU LAW—ALIENATION BY WIDOW. **I. L. R. 36 All. 187**

LEGAL PRACTITIONERS ACT (XVII OF 1879).

——— s. 13—*Gross misconduct—Wilful neglect of pleader to appear after receipt of full fees—"Actionable claim" purchase of, by a pleader—Transfer of Property Act (IV of 1882), ss. 3 and 136—Pleader engaging in trade without intimating to the High Court—Rule 27 of the Rules under Legal Practitioners Act. Held* by the Full Bench : The judgment and evidence given in a civil suit, filed by a party, against his pleader, for refund of fees on account of non-appearance of the pleader are admissible, as evidence in an enquiry instituted for the purpose against the pleader, under the Legal Practitioners Act ; but, they are not conclusive proof in the enquiry. Wilful neglect by a pleader to appear without any justification whatever, and conduct a case after receipt of full fees, is unprofessional conduct for which the pleader could be punished under s. 13 of the Legal Practitioners Act. *Per* BENSON (OFFG. *C. J.*) and SUNDARA AYYAR, *J.*—A false defence of non-receipt of fees is an aggravation of the misconduct in failing to appear. *Per* SUNDARA AYYAR, *J.*—The judgment and the evidence in the civil suit, are relevant under s. 11 of the Evidence Act. Wilful neglect to appear, after receipt of full fees, is worse than gross negligence, for which also a pleader might be punished and it amounts to fraudulent conduct on the part of the pleader. *Obiter* : SANKARAN NAIR, *J.*—A vakil is bound to appear and conduct his case even if the fee or any portion thereof remains unpaid, in the absence of any agreement to the contrary or at least notice to the client in sufficient time to enable him to make other arrangements. *Obiter* : SUNDARA AYYAR, *J.*—In the absence of an agreement that the fee promised should be previously paid, it is, to say the least, very doubtful, whether a plea of non-payment of part of the fee, would be of any avail. *Held*, by the Full Bench, that a claim is none the less an "actionable claim" within the meaning of s. 3 of the Transfer of Property Act, because a suit had been instituted thereon. Purchase of an "actionable claim" by a pleader, is prohibited by s. 136 of the Transfer of Property Act, and a pleader is guilty of unprofessional conduct in such a purchase within the meaning of s. 13 of the

LEGAL PRACTITIONERS ACT (XVII OF 1879)—*concld.*

——— **s. 13**—*concld.*

Legal Practitioners Act. It is gross misconduct on the part of the pleader, if the purchase be speculative, especially if it is made, just when the claim is ripe for judgment and when the seller is his own client unable to judge of the result of the suit. *Held*, also, by the Full Bench : Whether the purchase of an " actionable claim " by a pleader, will amount to gross misconduct on the part of the pleader, is a question to be determined on the particular facts of each case. *Per* SUNDARA AYYAR, *J.*—The onus is on the pleader who purchases an " actionable claim," to show that in the circumstances of the particular case, it does not amount to gross misconduct. *Held*, by the Full Bench : A pleader who engages himself in trade but does not intimate the same to the High Court, as required by r. 27 of the Rules framed by the High Court under the Legal Practitioners Act, is guilty of misconduct, within the meaning of the s. 13 of the Act. Their Lordships of the Full Bench, considered it unnecessary to inflict any punishment for such violation of the rules, in the absence of a specific charge to that effect. *Obiter:* SUNDARA AYYAR J. A pleader who merely supervises a trade even if only during his leisure hours and holidays must be said to be personally carrying on the trade even if the ordinary routine work of the trade is carried on by means of servant and agent. If all the members of a family of whom the pleader is one, enter into a partnership and carry on a family-trade as partners, then all of them must be regarded as carrying on the trade. It is otherwise, if some members alone of the joint family carry on the family-trade, in which the pleader has no direct concern so far as the outside world is concerned, though, as between the members *inter se* all of them might be responsible for the result of the trade. *Obiter* : SANKARAN NAIR, *J.*—In the circumstances of this country and under the present conditions of the legal profession, it may be inexpedient and unnecessary for the High Court, to declare that a pleader should not follow any trade or business and that it is unprofessional for him to do so. MUNI REDDI *v.* VENKATA ROW (1914)
I. L. R. 37 Mad. 238

LEGAL PROCEEDINGS.

See AGREEMENT. **I. L. R. 37 Mad. 408**

LEGAL REMEMBRANCER.

See CONTEMPT OF COURT.
I. L. R. 41 Calc. 173

See PUBLIC PROSECUTOR.
I. L. R. 41 Calc. 425

LESSEE.

——— **right of, to eject trespasser**—

See EJECTMENT. **I. L. R. 37 Mad. 281**

LETTERS OF ADMINISTRATION.

See SUCCESSION ACT (X OF 1865), S. 190.
I. L. R. 38 Bom. 618

LETTERS PATENT, 1865.

——— **cl. 10.**

See PROFESSIONAL MISCONDUCT.
I. L. R. 41 Calc. 113

——— **cls. 10, 39.**

See APPEAL TO PRIVY COUNCIL.
I. L. R. 41 Calc. 734

——— **cls. 13, 20.**

See MINOR . . **L. R. 41 I. A. 314**

——— **cls. 15, 16, 39.**

See APPEAL . **I. L. R. 41 Calc. 323**

——— **cls. 27, 28.**

See CONTEMPT OF COURT.
I. L. R. 41 Calc. 173

LETTERS PATENT (BOMBAY HIGH COURT).

——— **cl. 35.**

See DIVORCE ACT, (IV OF 1869), SS. 2, 4, 7 AND 45.
I. L. R. 38 Bom. 125

LIBEL ON MAGISTRATE.

See PRIVY COUNCIL, PRACTICE OF.
I. L. R. 41 Calc. 1023

LICENSEE.

See NEGLIGENCE. **I. L. R. 38 Bom. 552**

LIFE ESTATE.

See WILL. . **I. L. R. 38 Bom. 697**

LIFE INSURANCE.

See MARRIED WOMEN'S PROPERTY ACT. 1874, SS. 2, 4, 6. **18 C. W. N. 1335**

LIMITATION.

See ADVERSE POSSESSION.
I. L. R. 38 Bom. 227

See AMENDMENT OF PLAINT.
I. L. R. 36 All. 370

See CIVIL PROCEDURE CODE (1882), S. 230
I. L. R. 37 Mad. 186

See COMPANY . **I. L. R. 36 All. 412**

See EXECUTION OF DECREE.
I. L. R. 36 All. 482

See LIMITATION ACT (XV OF 1877), S. 4, SCH. II, ART. 179 (2).
I. L. R. 36 All. 284

See LIMITATION ACT (XV OF 1877), S. 19.
I. L. R. 36 All. 408

See LIMITATION ACT (XV OF 1877), SCH. II, ART. 148. **I. L. R. 36 All. 195**

See LIMITATION ACT (IX OF 1908), S. 5.
I. L. R. 36 All. 235

See LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 62, 120.
I. L. R. 36 All. 555

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 120. **I. L. R. 36 All. 492**

LIMITATION—*contd.*

See LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 132 AND 144.
I. L. R. 36 All. 567

See PROBATE . **I. L. R. 41 Calc. 819**

See RESIDUARY LEGATEE.
I. L. R. 41 Calc. 271

——— **by adverse possession—**

See LANDLORD AND TENANT.
I. L. R. 41 Calc. 683

——— **respecting claim for rent—**

See MADRAS ESTATES LAND ACT (I OF 1908) . . **I. L. R. 37 Mad. 540**

1. ——— *Sebait—Share of surplus offerings—Alienation by widow—Suit to recover—Hereditary office—Limitation Act (IX of 1908), Arts. 124 and 140.* In 1910, the *sebait* of a Hindu temple instituted a suit for a declaration that he was entitled to a 3 annas 6 pies share in the daily surplus offerings to the idol, that share being attached to the office. The defendant had been in possession of the share since 1892, having bought upon its sale in execution of a decree obtained by him against the widow of a former *sebait*. She died in 1900. The defendant was precluded by his caste from holding the office of *sebait* : *Held*, that the suit was not to recover an hereditary office, within the meaning of the Limitation Act, 1908, Sch. I, Art. 124, and that it was not barred since a fresh actionable wrong arose upon each occasion when the defendant received the share in question. JALANDHAR THAKUR *v.* JHARULA DAS (1914) . . . . **L. R. 41 I. A. 267**

2. ——— *" Dispossession " —Possession, recovery of, suit for—Dispossession of auction-purchaser of tenant's right by a subsequent acution-purchaser—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3.* By the word " dispossession " in Art. 3 of Sch. III of the Bengal Tenancy Act is meant dispossession by the landlord as landlord. RUDRA NARAIN MAITI *v.* NATOBAR JANA (1913) . . . **I. L. R. 41 Calc. 52**

3. ——— *Amending Act, retrospective effect of —Suit, right of, how far affected by amending Act—Vested right—Bengal Tenancy Act (VIII of 1885 as amended by Beng. Act I of 1907), s. 184 and Sch. III., Art. 3.* Where the application of the provisions of an amending Act makes it impossible to exercise a vested right of suit, the Act should be construed as not being applicable to such cases. Though procedure may be regulated by an Act for the time being in force, still the intention to take away a vested right without compensation or any saving, is not to be imputed to the Legislature in any case unless it be expressed in unequivocal terms. *Commissioner of Public Works (Cape Colony)* v. *Logan*, [1903] *A. C. 355*, and *Colonial Sugar Refining Co.* v. *Irving*, [1905] *A. C. 369*, followed. A right of suit is a vested right. *Jackson* v. *Woolley, 8 El. & Bl. 784*, referred to. The decision of the majority in *Manjhoori Bibi* v. *Akel Mahumed, 17 C. W. N. 89* has not been affected by the judgment of the Privy Council in *Soni Ram v. Kanhaiya Lal, I. L. R. 35 All. 227; L. R. 40 I. A. 74*, in cases where the effect of the application of the amended law would be to confiscate a vested right. GOPESHWAR PAL *v.* JIBAN CHANDRA CHANDRA (1914) . . **I. L. R. 41 Calc. 1125**

4. ——— *Exclusion of time —Excuse of delay—Time taken up in proceedings before a conciliator—Non-granting of certificate owing to Government ending the conciliation system.* The plaintiff advanced money on a bond which became due on the 31st May 1910. He applied to the conciliator for a certificate on the 28th March 1913, but before the certificate could be had Government abolished the conciliation system with effect from the 30th May 1913. The plaintiff filed a suit to recover the money on the 30th June 1913 ; and he claimed to exclude from the period of limitation the time between the 28th March and 30th May 1913 : *Held*, that though the plaintiff was not entitled to deduct the time from 28th March to 30th May 1913, he was entitled to such extension of time as might be necessary to give him a reasonable opportunity to enable him to file the suit in time. SATYABHAMABAI *v.* GOVIND (1914) **I. L. R. 38 Bom. 653**

5. ——— *Limitation Act (IX of 1908), s. 4—Exclusion of time—Certificate of conciliator—Time taken up in obtaining conciliator's certificate—Abolition by Government of the conciliation system—Closing of the Court during vacation— —Suit filed on the opening day is suit filed in time— Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 48.* The plaintiff advanced money on two bonds which became due on the 24th February 1910. He applied for a conciliator's certificate on the 13th February 1913 and obtained it on the 26th April 1913. From the 28th April to the 8th June 1913 the Court was closed for the Summer Vacation. In the meanwhile, Government abolished the conciliation system with effect from the 30th May 1913. The plaintiff filed the present suit to recover the money on the 9th June 1914 and claimed to exclude the time taken up in the conciliation proceedings : *Held*, that the suit, though filed on the 9th June 1913 when the conciliation system was abolished, was substantially one to which the provisions of Ch. VI of the Dekkhan Agriculturists' Relief Act were applicable throughout the period of limitation which expired during the vacation, and the plaintiff was, therefore, entitled to deduct the period between his application and the grant of the certificate. *Held*, also, that assuming that s. 48 of the Dekkhan Agriculturists Relief Act did not apply, as the plaintiff's suit would be strictly in time up to a certain date during the vacation, on which day he could not file it as the Court was closed, he could file it on the re-opening of the Court under s. 4 of the Limitation Act. *Held*, further, that when the law had created a limitation, and the party had been disabled from conforming to that limitation without any default in him, and he had no remedy

LIMITATION—*concld.*

over, the law would ordinarily excuse him. RUPCHAND MAKUNDAS *v.* MUKUNDA MAHADEV (1914) **I. L. R. 38 Bom. 656**

LIMITATION ACT (XV OF 1877).

——— **s. 4, Sch. II, Art. 179** (*2*)—*Limitation—Application for execution of decree—Practice of Privy Council—Order of dismissal for want of prosecution of appeals to Privy Council—Order of 15th June, 1853, r. V—Dismissal of appeal for want of prosecution without order made in the appeal.* Under r. V of the Order in Council of 15th June, 1853, (1) where for a period specified in the order the appellant to His Majesty in Council, or his agent, has not taken any effectual steps for the prosecution of the appeal, it stands dismissed without further order. Such a dismissal for want of prosecution is not the final decree of an Appellate Court within the meaning of Art. 179, cl. 2, of Sch. II of the Indian Limitation Act, 1877, from which a period of limitation can be reckoned under that article in support of an application for execution of a decree. In this case the application for execution having been made more than three years after the decree of the High Court was therefore barred by lapse of time, and should have been dismissed on that ground under s. 4 of the Limitation Act. BATUK NATH *v.* MUNNI DEI (1914) **I. L. R. 36 All. 284**

——— **s. 19**—*Acknowledgment—Suit for redemption—Admission in plaint that a certain person had a right to redeem as a co-mortgagor.* Where in a suit for redemption of a mortgage the plaintiffs, who were purchasers of a portion of the mortgaged property, admitted in their plaint the right of a representative of one of the original mortgagors to redeem, it was *held* that this was a good acknowledgment within the meaning of s. 19 of the Indian Limitation Act, 1877, and enured in favour of the representatives of the person so mentioned. *Sukhamoni Chowdhrani* v. *Ishan Chunder Roy, I. L. R. 25 Calc. 844; L. R. 25 I. A. 95,* referred to. BALESHAR *v.* RAM DEO (1914) **I. L. R. 36 All. 408**

——— **Sch. II, Arts. 120, 132.**—*Suit by second mortgagee for surplus proceeds after sale by first mortgagee—Sale-proceeds wrongfully withdrawn from Court in execution of decree on later mortgage suit for money—Suit to enforce mortgage—Civil Procedure Code, 1882, ss. 244 and 295. cl.(c).* Certain immoveable property was mortgaged on 21st May 1887 to the appellants, and on 19th September 1887 the same property was mortgaged by the same mortgagor to the respondents (the mortgage money being repayable on the 18th November 1888), and again on 19th July 1889 to the appellants. On 8th October 1890 the appellants, in a suit in which the respondents though made parties did not appear, obtained a decree on their mortgage of 21st May 1887 in execution of which the mortgaged property was sold; and after satisfying the decree the sale-proceeds were deposited in Court. On 14th January 1891 the appellants obtained a decree on their mortgage of

LIMITATION ACT (XV OF 1877)—*contd.*

——— **Sch. II, Arts. 120, 132**—*concld.*

19th July 1889 in a suit to which they did not make the respondents parties; and in execution of that decree, without giving any notice to the respondents, they drew out of Court the surplus proceeds of the former sale, though they were aware of the respondents' mortgage of 19th September 1887, and of its priority to their own. In a suit brought on 17th November 1900 by the respondents against the appellants for the surplus sale-proceeds, it was contended that the suit was one for money governed by Art. 120 of Schedule II of the Limitation Act of 1877, and barred as not having been brought within 6 years from the 18th November 1888 when the money became due. *Held* (affirming the decision of a majority of a Bench of the High Court), that the suit was one " to enforce payment of money charged upon immoveable property " within the meaning of Art. 132 of Schedule II of the Act, and having been brought within 12 years from the date when the money became payable was not barred by limitation. The surplus sale-proceeds represented the security which the respondents had under their mortgage of 19th September 1887, and did not cease to represent that security by the fact of the appellants having wrongfully withdrawn the surplus sale-proceeds from the Court where they were deposited. Under the circumstances of the case section 295, clause (*c*) of the Civil Procedure Code, 1882, was not applicable. BARHAMDEO PRASAD *v.* TARA CHAND (1913) **I. L. R. 41 Calc. 654**

——— ——— **Sch. II, Art. 148.**—*Limitation—Suit for redemption—Mortgage by conditional sale—Specified period for redemption—Payment of mortgage debt within specified time—Accrual of cause of action.* Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period, and take back the property. Such a provision is usually to the advantage of the mortgagor. The father of the plaintiff executed a mortgage by way of conditional sale on the 6th of January, 1830, in respect of 12 villages in favour of the predecessor in title of the principal defendant; and there was at the time of execution a contemporaneous agreement "that the sale would be cancelled on payment of the amount of consideration in nine years." In a suit brought on the 6th of January, 1899, for redemption the High Court held on the construction of the contract that the suit was not barred, as the right to redeem only arose on the expiry of the nine years. *Held,* by the Judicial Committee, that the case must be decided, not on the construction of the contract, but on the case made by the plaintiff on the pleadings, which was that she was entitled under the agreement to redeem the property within the period of nine years, and by the statement of account produced with the plaint which showed

LIMITATION ACT (XV OF 1877)—*concld.*

——— **Sch. II, Art. 148**—*concld.*

that the mortgage debt was actually satisfied under the contract on the 4th of September, 1838 ; and that being so, the right to redeem then accrued, and the whole suit was therefore barred, not having been brought within 60 years from that date [Art. 148 of schedule II of the Limitation Act, XV of 1877]. BAKHTAWAR BEGAM *v.* HUSAINI KHANUM (1914) . . . . **I. L. R. 36 All. 195**

——— **Sch. II, Arts. 179, 180—**

See PRIVY COUNCIL.

I. L. R. 36 All. 350

LIMITATION ACT (IX OF 1908).

——— **s. 3—**

See CONTRACT ACT (IX OF 1872), S. 28.

I. L. R. 38 Bom. 344

——— **s. 4—**

See LIMITATION **I. L. R. 38 Bom. 656**

——— **s. 5**—*Appeal presented beyond time—Provisional admission to file in the absence of respondent—Preliminary objection taken by the respondent at the hearing—Entertainment of the question—Appeal dismissed with all costs—Second appeal.* A time-barred appeal having been provisionally admitted to the file in the absence of the respondent and at the hearing the respondent having taken a preliminary objection that the appeal was presented beyond time, the Court allowed the objection and dismissed the appeal with all costs on the appellant. On further appeal by the appellant: *Held*, that there being no sufficient cause as a matter of law for extending the time under section 5 of the Limitation Act (IX of 1908), there was no objection to the question being entertained after the provisional admission of the appeal to the file in the absence of the respondent. *Held*, further, that the appeal against the order dismissing the appeal was a second appeal and not a first appeal because it was an appeal against the decree of an Appellate Court. RAOJI *v.* KRISHNARAO (1914)

I. L. R. 38 Bom. 613

——— **s. 5**—*Civil Procedure Code (1908), Order XXII, rules 4 and 9—Limitation—Parties—Application for substitution of names filed beyond time—Procedure.* Section 5 of the Indian Limitation Act, 1908, does not apply to an application made under Order XXII, rule 4, of the Code of Civil Procedure. Where, therefore, such an application is made after time, the suit or appeal must be declared to have abated, and the remedy for the plaintiff or appellant is to proceed by application under Order XXII, rule 9. SECRETARY OF STATE FOR INDIA *v.* JAWAHIR LAL (1914)

I. L. R. 36 All. 235

——— **s. 6.—**

See CIVIL PROCEDURE CODE (ACT XIV OF 1882, S. 230. **I. L. R. 37 Mad. 186**

——— **s. 7**—*Receiver, if can give discharge of debt—Minor owner.* A Receiver upon whom the Court has conferred all the powers of realisation that an owner has, can himself give a discharge in respect of a debt. He is not fettered by the restrictions which are laid upon any one of several joint creditors or upon a next friend. Where a decree on a bond was passed on 5th August 1904, in favour of the plaintiffs, some of whom were minors, the suit having been filed on 21st June 1904 through their manager and *ammukhtear*, who was appointed Receiver by the District Judge on 15th September, 1905, in a suit between the plaintiffs and was put in charge of the whole business of the plaintiffs with all its " pending and impending litigation," and a Receiver was in charge from that time onwards ; and no steps were taken in execution of the decree until 11th May, 1910 when one of the minors applied for execution alleging that he had attained majority on 5th June 1907 : *Held*, that the application for execution was barred by limitation. That the decretal debt vested in the Receiver when he was appointed on 15th September 1905, and from that date onwards he was competent to give a discharge ; when once the debt had vested in him the mir ority of one or more of the decree-holders ceased to have any importance for the rights of the minor no less than the rights of the majors were all absorbed by the Receiver. *Jagat Tarini Dasi* v. *Noba Gopal Chaki, I. L. R. 34 Calc. 305*, referred to. GIRJA NANDAN SINGH *v.* KANHAYA PROSAD SAHU (1913)

18 C. W. N. 138

——— **s. 7, Sch. I, Art. 44**—*Joint Hindu family consisting of minors and widows—Manager—Mukhtiarnama executed by manager—Management by the mukhtiar during the life-time and after the death of the manager—Sale by the mukhtiar after the death of the manager—Binding effect—Minor—Limitation to set aside sale.* K, the manager of a joint Hindu family consisting of minors and widows, executed a *mukhtiarnama* providing for the management of the family estate, including settlement of money debts and pecuniary claims both during his life-time and after his death until his eldest minor son attained majority. The *mukhtiar* was empowered to manage the estate as he thought fit including the power of sale and settle claims as *K* himself could have done during his life-time. In connection with the registration of the *mukhtiarnama*, the Sub-Registrar examined the widows in the family including the widow of *K*, the manager, who had died in the meanwhile, and the deed was registered as the widows admitted the same. Subsequently the *mukhtiar* sold *mulgeni* (leasehold) rights of the family in certain lands for valuable consideration. *K's* eldest son having attained majority on the 10th December, 1894, he with his minor brother brought a suit on the 17th May, 1899, to recover possession of the property alleging that the sale of the *mulgeni* (leasehold) rights was void *ab initio*. The lower Courts having dismissed the suit, on second appeal by the plaintiffs : *Held*, that (i) the sale by the *mukhtiar* was binding no plaintiffs as having been within the authority conferred by the *mukhtiarnama*. (ii) The sale

LIMITATION ACT (IX OF 1908)—*contd.*

——— **s. 7**—*concld.*

could not be treated as a nullity, inasmuch as a dying adult Hindu might appoint a manager and trustee for the minors themselves without interfering with the succession to the property. *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry, 13 Moo. I. A. 209*, and *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh, 7 W. R. 74*, referred to. (iii) The right of plaintiff 1, if any, to challenge the sale was barred at the date of the suit under article 44, schedule I of the Limitation Act (IX of 1908) by reason of his failure to sue within three years of his attaining majority. (iv) plaintiff 2, a minor, was also barred under section 7 of the Limitation Act (IX of 1908) inasmuch as plaintiff 1 after attaining majority could have bound the minor plaintiff if he had chosen to give a discharge and acquittance of all claims to the defendants in respect of *mulgeni* (leasehold) interests, as manager. MAHABLESHVAR KRISHNAPPA *v.* RAMCHANDRA MANGESH (1913) . . **I. L. R. 38 Bom. 94**

——— **s. 12**—*Application for leave to appeal to Privy Council—Time taken for obtaining copy of decree if may be excluded—Indian Statue permitting exclusion, if ultra vires—Order in Council of 1838—Government of India Act of 1858, s. 64—Letters Patent, cls. 39, 44—Privy Council Appeals Act (VI of 1874).* An application for leave to appeal to His Majesty in Council is not time-barred, if excluding the time taken for obtaining a copy of the decree appealed from it is found to have been made within 6 months. S. 12 of the Limitation Act of 1908 is within the legislative powers of the Government of India in permitting such exclusion. ABDULLAH HUSAIN CHOUDHRY *v.* ANANDA CHANDRA RAY (1914) . . **18 C. W. N. 1066**

——— **s. 15**—*Decree—Execution of decree—Application to execute the decree—Exclusion of time—Period during which execution of decree is stayed to be excluded in computing period of limitation.* On the 8th August, 1908, an application to execute a decree was made. The Court having directed the execution to proceed as to a part of the decree, the judgment-debtor appealed against the order and pending the appeal, the execution of the decree was stayed from the 9th January to the 18th February 1909. On the 12th August, 1911, the decree-holder applied again to execute the decree. The lower Courts held that the second application was barred by limitation, it having been made more than three years after the date of the first application. On second appeal :—*Held*, that the second application was filed within time, for the applicant was entitled to exclude the period during which the execution of the decree was stayed, in computing the period of limitation for the second application. BAI UJAM *v.* BAI RUXMANI (1913) **I. L. R. 38 Bom. 153**

——— **s. 19—Sch. I, Art. 182, cl. 5**—*Written acknowledgment—Application made for certifying payments on the decree acknowledging the decree as an outstanding decree—Step-in-aid of execution.* The plaintiff obtained a decree on the 3rd July 1900

LIMITATION ACT (IX OF 1908)—*contd.*

——— **s. 19**—*concld.*

whereby he was required to pay a sum of Rs. 600 by annual instalment of Rs. 50 and to redeem the mortgaged land. The decree also provided that on failure to pay any two instalments the plaintiff's right to redeem was to be foreclosed and the defendant was to be placed in possession of the land. The instalments for 1901 and 1902 were duly paid, while the one for 1903 was only paid in part. No other payments were made. On the 20th July 1905, the plaintiff made an application to the Court, which was consented to by the defendant, for certifying the above payments in satisfaction of the decree. This application referred to the decree as an outstanding decree. On the 14th December, 1907, the defendant applied to foreclose the decree; but the application was dismissed for want of prosecution. He applied again on the 29th March 1909 for the purpose ; but his application was dismissed as barred by limitation. The defendant having appealed :—*Held*, that the application was within time, for the application of 1905 was sufficient to give a fresh starting point for limitation, either as an acknowledgment within the meaning of s. 19 of the Limitation Act (IX of 1908) or as a step-in-aid of execution under Article 182, caluse 5 of the First Schedule to the Act. BACHARAJ NYAHALCHAND *v.* BABAJI TUKARAM (1913) **I. L. R. 38 Bom. 47**

——— **ss. 19 and 20**—*Payment or acknowledgment by one partner only—Invalid as against other partners in absence of proof of authority to make it—No presumption of such authority—Contract Act (IX of 1872), s. 251—Necessary or usually done in carrying on partnership—Proof under, insufficient—Judicial notice—Practice. Held*, that according to the rulings in this Presidency, an acknowledgment or payment made by one partner does not bind the other partners, in the absence of proof that they authorised such acknowledgment or payment, though it may be an act neceassary or one usually done in carrying on the business of partnership ; and such authority cannot be presumed. The decisions in *Valasubramania Pillai* v. *Ramanatha Chettiar, I.L. R. 32 Mad. 421*, and *Shaik Mohideen Sahib* v. *Official Assignee of Madras, I. L. R. 35 Mad. 142*, require to be reconsidered in the light of the rulings of the English and other Indian High Courts. Such acknowledgments are made as a matter of course by trade debtors, whether carrying on business singly or in partnership and are forthcoming in almost every suit for the price of goods sold and delivered. This is a matter within the daily experience of Courts of first instance so that they are entitled to take judicial notice of it without requiring proof of the same. K. R. V. FIRM *v.* SEETHARAMASWAMI (1914) **I. L. R. 37 Mad. 146**

——— **s. 164**—

See PROBATE . **I. L. R. 41 Calc. 819**

——— ——— **Sch. I, Arts. 2, 62, 102.**—*Limitation—Suit for refund of octroi duty not alleged to have been in the first instance illegally exacted.* The plaintiff

LIMITATION ACT (IX OF 1908)—*contd.*

Sch. I, Arts. 2, 62, 102—*concld.*

sued a municipal board for a refund of octroi duty. He did not allege that the duty had in the first instance been taken from him illegally, but that he had after payment thereof become entitled to a refund. *Held*, that the suit was governed by article 120 and not by article 2 or article 62 of the Indian Limitation Act, 1908. *Rajputana-Malwa Railway Co-operatives Stores* v. *Ajmere Municipal Board, I. L. R. 32 All. 491, Guru Das* v. *Ram Narain, I. L. R. 10 Calc. 860*, and *Hanuman* v. *Hanuman, I L. R. 19 Calc. 123*, referred to. MUNICIPAL BOARD OF GHAZIPUR *v.* DEOKINANDAN PRASAD (1914) . . **I. L. R. 36 All. 555**

Sch. I, Art. 11—*Period of limitation altered by implication—S. 30, if applies—Claim petition dismissed for default—Regular suit, if must be brought within a year—Civil Procedure Code (Act XIV of 1882), ss. 278, 281.* The operation of s. 30 of the Limitation Act is not limited to cases in which the period of limitation has been expressly altered. It applies also to a case where the period of limitation has been altered as the result of the alteration of the description of the suit. Art. 11 of the Limitation Act does not apply where a claim preferred under s. 278 of Act XIV of 1882 was "dismissed for absence," the order of dismissal not being an order passed under s. 281 of that Act but under those sections of the Code which enabled a Court to dismiss a miscellaneous case for default. UMACHARAN CHATTERJEE *v.* HERON MOYEE DEBI (1913) . . . . **18 C. W. N. 770**

Sch. I, Arts. 49, 60, 61, 62, 81, 89, 120 and 145—*'Specific moveable property', meaning of, in article 49—Whether includes money—Residuary article, when to be applied—Money had and received to the plaintiff's use.* Where the karnavan of a Malabar tarwad sued a junior for recovery of a sum of tarward money received by the latter, but withheld by him in denial of the plantiff's right to the same. *Held*, that the case was governed by article 62, as the defendant had received monies belonging to the plaintiff which *ex æquo et bono* he ought to refund, and the cause of action was for money had and received to the plaintiff's use, and arose on the date of the receipt, and not on the date of the denial of the plaintiff's right to the money. *Mahomed Wahib* v. *Mahomed Ameer, I. L. R. 320 Calc. 527*, referred to. 'Specific moveable property' in article 49 does not include money, though money is 'moveable property' within article 89. Specific property is property which is recovered *in specie, i.e.*, the very property itself, not any equivalent or reparation. The residuary article 120 should be applied only as a last resort, if no other article is applicable. *Sharoop Dass Mondal* v. *Joggessur Roy Chowdhry, I. L. R. 26 Calc. 564*, referred to. SANKUNNI *v.* GOVINDA (1914) **I. L. R. 37 Mad. 381**

Sch. I, Arts. 61, 99, 120.—*Contribution suit—Limitation when begins to run—Date of payment.*] One R B deposited a certain sum of money in a Bank owned by R and his two brothers S and

LIMITATION ACT (IX OF 1908)—*contd.*

Sch. I, Arts. 61, 99, 120—*concld.*

G. R B brought a suit and obtained a decree for the money deposited against R and the representatives of his brothers S and G. On appeal the High Court exempted G's representatives from liability under the decree in so far as they inherited the share of the family property from G. R B executed his decree against R and advertised some properties exclusively belonging to R for sale. On the 8th December 1900, one Raja S as the purchaser of certain mehals belonging to R and his son (the plaintiff) paid in the decretal amount and the execution case was finally struck off. R put in an application stating that the petition filed by the decree-holder stating satisfaction of the decree was without his knowledge and that the negotiations bwtween Raja S and himself regarding the sale of the properties had not been concluded. Raja S sued R for specific performance of the contract to sell and ultimately the High Court held that he could not get a decree for specific performance, but was only entitled to get back the money advanced with interest from the 8th December 1900. On 11th January 1906, Raja S in execution of this decree sold certain properties belonging to the plaintiff, the sale being confirmed on 21st June 1906, when Raja S obtained payment. On 3rd February 1908, the plaintiff instituted a suit for contribution against the legal representatives of R's brother S. *Held*, that it was doubtful whether Arts. 61 and 99, Sch. I of the Limitation Act, were applicable to the present case and under Art. 120 the period of limitation was six years from the time when the right to sue accrued. The date of payment by Raja S was not the date of payment by R within the meaning of Art. 99 of the Limitation Act. The plaintiff's right to sue accrued when the decree obtained by Raja S was satisfied by sale of plaintiff's property and the suit being brought withir two years from the date of that payment, was not barred by limitation. JANKI KOER *v.* DOMI LAL (1913). . **18 C. W. N. 480**

Sch. I, Art. 62.—*Payment by cheque.* In case of payment by a cheque, limitation runs not from the date of the delivery of the cheque, but from the date of the receipt of the money by the payee. SECRETARY OF STATE FOR INDIA *v.* MAJOR HUGHES (1913) . . **I. L. R. 38 Bom. 293**

Sch. I, Arts. 66, 115, 145.—*Deposit of money repayable at a fixed date—Articles 66 and 115 applicable, article 145 not applicable—"Deposit" in article 145, meaning of—Probate and Administration Act (V of 1881)—Title of executor to sue even without Probate or Letters—Limitation Act, s. 17—Same word, re-enacted in a repealing Act—Construction, same meaning as in the repealed Act.* Article 145 of the Limitation Act (IX of 1908) is not applicable to deposits of money. "Deposit" in article 145 means only deposit of goods to be returned in specie when wanted; it is the sort of bailment known to lawyers under that name in the Roman Law of Bailments which

LIMITATION ACT (IX OF 1908)—*contd.*

Sch. I, Arts. 66, 115, 145—*concld.*

was accepted by Bracton and afterwards by Lord Holt in *Coggs* v. *Barnard, (1703) Sm. L. C. 173 ; s.c., 2 Raym. 909,* as fit to be enforced in England. *Ishur Chunder Bhaduri* v. *Jibun Kumari Bibi, I. L. R. 16 Calc. 25,* and *Perundevitayar Ammal* v. *Nammalwar Chetty, I. L. R. 18 Mad. 390,* followed. *Administrator General, Bengal* v. *Kristo Kamini Dassee, I. L. R. 31 Calc. 519,* and *Lala Gobind Prasad* v. *Chairman of Patna Municipality, 6 C. L. J. 535,* not followed. A loan repayable at a fixed date is governed by article 66, and if not by article 115. Unlike cases governed by the Indian Succession Act and the Hindu Wills Act, in a case governed by the Probate and Administration Act (V of 1881), the obtaining of probate is not necessary to clothe the executor with the right to sue for debts due to the testator, and the estate is represented by the executor even in the absence of probate, within the meaning of s. 17 of the Limitation Act, and time begins to run from death of the testator's death, as the obtaining of a succession certificate is not a condition precedent to the filing of a suit but is only necessary before getting a decree. Where a word which is used in one sense in one Act is re-enacted in a subsequent Act which repeals the former, then unless there is some strong reason to the contrary, it must be read in the same sense in the subsequent Act in which it is re-enacted. *Mayor of Portsmouth* v. *Smith, L. R. 10 A. C. 364, 371,* referred to. Testatrix lent money to the defendant on 15th August 1900, and died on 16th January 1904. The will was governed by the Probate and Administration Act. *Held,* that a suit by the executor in 1910 was barred by limitation either under article 66 or 115 of the Limitation Act. BALAKRISHNUDU *v.* NARAYANASAWMY CHETTY (1914)

I. L. R., 37 Mad. 175

Sch. I, Art. 91—

See KHOJAS . **I. L. R. 38 Bom. 449**

Sch. I, Arts. 116. 66, s. 19—*Registered bond—Suit to recover money due on the bond—Period of limitation—Acknowledgment contained in promissory notes.* On the 17th June 1897, the defendant passed a registered mortgage bond in favour of the plaintiff. It was attested by one witness and made the mortgage amount repayable in three instalments, the last one becoming due on the 24th June 1900. On the 24th August 1903, the defendant passed a promissory note in favour of the plaintiffs, wherein he stated : " An account is taken to-day and the amount due under the mortgage deed is set apart." Again, on the 11th August 1906, he passed another promissory note which recited : " Besides this the mortgage debt is distinct." The plaintiff sued on the 6th August 1910 to recover the money due under the bond : *Held,* that the words used in the two promissory notes amounted to acknowledgments within the meaning of section 19 of the Limitation Act. *Held,* further, that the suit was governed by Article 116 and not by Article 66 of the Limitation Act

LIMITATION ACT (IX OF 1908)—*contd.*

Sch. I, Arts. 116, 66—*concld.*

for though the suit was in form a suit for money due on a bond, it was in substance a suit for compensation for breach of a contract. *Ramdin* v. *Kalka Pershad, L. R. 12 I.A. 12,* and *Bulakhi Ganu Shet* v. *Tukarambhat,' I. L. R. 14 Bom. 377,* commented on. DINKAR HARI *v.* CHHAGANLAL NARSIDAS (1913) . . . **I. L. R. 38 Bom. 177**

Sch. I, Art. 120.—*Suit for declaration of title—Previous unsuccessful application to correct entry in village papers—Cause of action—Limitation.* In 1875, the owners of certain zamindari property sold their interest in it with the exception of 26 bighas. In 1888, the vendors were recorded as exproprietary tenants of these 26 bighas. In 1903, the representatives of the vendors applied to have the village papers corrected, but their application was dismissed and they were told to go to the Civil Court. In 1910, the representatives of the purchasers applied to have rent assessed on the 26 bighas and obtained an order in their favour. The representatives of the vendors thereupon brought the present suit in the Civil Court for a declaration that they were proprietors. *Held,* that, whatever cause of action the plaintiffs might have had before the proceedings of 1910, the order passed in those proceedings gave them a fresh cause of action and their suit was not barred by limitation. *Legge* v. *Rambaran Singh, I. L. R. 20 All. 35, Akbar Khan* v. *Turaban, I. L. R. 31 All. 9, Sheopher Singh* v. *Deonarain Singh, 10 All. L. J. 413, Purshottam* v. *Parmanand, Misc. No. 279 of 1908,* and *Skinner* v. *Shankar Lal, S. A. No. 263 of 1907, referred to.* ALLAH JILAI *v.* UMRAO HUSAIN (1914)

I. L. R. 36 All. 492

Sch. I, Art. 123—

See RESIDUARY LEGATEE.

I. L. R. 41 Calc. 271

Sch. I, Arts. 124, 140—

See LIMITATION—SEBAIT.

L. R. 41 I. A. 267

Sch. I, Arts. 132 144—*Limitation—Mortgage—Suit for sale on a mortgage impleading defendants alleged to be in adverse possession of the mortgage property. Held,* that a suit for sale on a mortgage can always be brought under article 132 of the first schedule to the Indian Limitation Act, 1908, against all persons in possession, whose possession is subsequent to the date of the mortgage, provided that the suit is brought within twelve years from the time at which the money became due. Such a suit does not become a suit for possession governed by article 144 because it may be necessary to implead persons who are in possession and claim a title by possession adverse to the mortgagor. *Karan Singh* v. *Bakar Ali Khan, I. L. R. 5 All. 1,* distinguished. *Nandan Singh* v. *Jumman, I. L. R. 34 All. 640,* and *Aimadar Mandal* v. *Makhan Lal Day, I. L. R. 33 Calc. 1015,* referred to. RAJ NATH *v.* NARAIN DAS (1914)

I. L. R. 36 All. 567

LIMITATION ACT (IX OF 1908)—*concld.*

———— **Sch. I, Art. 181**—*Consent decree—Instalments—Application for decree absolute for sale—Limitation—Civil Procedure Code (Act V of 1908), Order XXXIV.* An application for a decree absolute for sale of a mortgage charge under the terms of a consent decree, which provided for satisfaction of the decretal debt by instalments, is an application under the Civil Procedure Code (Act V of 1908), Order XXXIV, and is governed by Article 181, Schedule I, of the Limitation Act (IX of 1908). Such application must be made within 3 years from the time the right to apply accrues. DATTO ATMARAM *v.* SHANKAR DATTATRAYA (1913). . . . **I. L. R. 38 Bom. 32**

———— **Sch. I, Art. 182**—

See CIVIL PROCEDURE CODE (ACT V OF 1908), SS. 38, 39, 41 AND 50, ETC.
I. L. R. 37 Mad. 231

See EXECUTION OF DECREE.
I. L. R. 36 All. 482

———— *Execution of decree*—"*Step in aid of execution*"—*Substituted service. Held*, that an application by a decree-holder seeking to execute his decree for substituted service on the judgment-debtor, is an application to take some step in aid of execution within the meaning of article 182 (*5*) of the first schedule to the Indian Limitation Act, 1908. *Pitam Singh* v. *Tota Singh, I. L. R. 29 All. 301*, referred to. AMINA BIBI *v.* BANARSI PRASAD (1914). **I. L. R. 36 All. 439**

LIMITATION ACTS.

———— **policy of**—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), S. 230. . **I. L. R. 37 Mad. 186**

LIMITED GROUND.

See APPEAL . **I. L. R. 41 Calc. 406**

LOCAL GOVERNMENT.

———— **ratification by**—

See SECRETARY OF STATE.
I. L. R. 37 Mad. 55

LOCAL SELF-GOVERNMENT ACT (BENG. III OF 1885).

———— **s. 2** (*2*).—*District Board of Manbhum bye-laws framed by—Encroachment, hanging verandah, if is.* A hanging verandah would be an encroachment if it amounted to an unlawful gaining upon the right of user by the public. That right extends to all forms of traffic which have been usual or customary and also all that are reasonably similar or incidental thereto. The question whether a hanging verandah amounted to an encroachment would depend in each case upon the question whether in the particular circumstances it constituted an invasion of the public right of user as described above. The public have a right of user not merely on the roadway, but also on the side lands attached to the road. HIRJI BALDEO *v.* MANBHUM DISTRICT BOARD (1913)
18 C. W. N. 1120

LOSS OF GOODS.

See CARRIERS. **I. L. R. 41 Calc. 80**

See RAILWAY COMPANY.
I. L. R. 41 Calc. 576

LUGGAGE.

———— **undeclared**—

See CARRIERS. **I. L. R. 41 Calc. 80**

LUNATIC.

———— *Lunatic suit against*—*Ex parte decree against unrepresented lunatic—Ignorance of Court as to fact of lunacy—Jurisdiction of Court—Fraudulent purchase by de facto manager of lunatic—Rights of purchasers from such fraudulent purchaser.* One N was a lunatic not adjudged as such. During his lunacy a suit for rent was brought by the landlord for two plots of land belonging to the lunatic and two rent-decrees were obtained *ex parte* against the lunatic who was not at all represented in the suit. The fact of the lunacy was not brought to the notice of the Court. At the auction-sales in execution of the decrees the properties were purchased by a person who was the lunatic's *de facto* manager who again sold them to other persons who purchased with full knowledge of the lunacy : *Held*, that as the lunatic or his estate was not represented in the rent-suit, the sales under the decrees of the Court therein obtained were nullities and the purchaser acquired no title by his purchase. The purchaser, being besides a fraudulent purchaser who had acted deliberately in breach of his trust as *de facto* manager of the lunatic, could not in any case be allowed to take advantage of the Court-sales even if they had been made with jurisdiction. As he had no title whatever, the purchasers from him also acquired no title. *Rasik Lal Datta* v. *Bidhumukhi Dassi, I. L. R. 33 Calc. 1094*, relied on. *Khairaj Mal* v. *Daim, I. L. R. 32 Calc. 296, 315*, doubted. HAKIMULLA *v.* NABIN CHANDRA BARUA (1914)
18 C. W. N. 1329

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MADRAS ACT.

———— **1864—II.**

See MADRAS REVENUE RECOVERY ACT.

———— **1865—VII.**

See MADRAS IRRIGATION CESS ACT.

———— **1865—VIII.**

See MADRAS RENT RECOVERY ACT.

———— **1882—V.**

See MADRAS FORESTS ACT.

———— **1884—V.**

See MADRAS LOCAL BOARDS ACT.

———— **1895—III.**

See MADRAS HEREDITARY VILLAGE OFFICES ACT.

MADRAS ACT—*concld.*

——— **1902—I.**

See MADRAS COURT OF WARDS ACT.

——— **1905—III.**

See MADRAS LAND ENCROACHMENT ACT.

——— **1908—I.**

See MADRAS ESTATES LAND ACT.

MADRAS COURT OF WARDS ACT (I OF 1902).

——— **s. 49** (*1*)—*Notice of suit—Suit for money is a suit relating to property of a ward:* A suit for money is a suit relating to the property of a ward within the meaning of sub-section (*1*) of s. 49 of Madras Act I of 1902 (Madras Court of Wards Act) and requires a notice of suit under that section. A mere *demand for payment* is not a notice of suit. VENKATACHELAPATHY *v.* SRI RAJAH B. S. V. SIVA RAO NAIDU BAHADUR (1912) **I. L. R. 37 Mad. 283**

MADRAS ESTATES LAND ACT (I OF 1908).

——— *Tender of patta not necessary to recover rent though accrued due prior to the Act—Limitation, when begins to run in respect of claim for rent.* In a suit for recovery of rent time runs from the time the rent became due according to the terms of the tenancy. *Arunachalam Chettiar* v. *Kadir Rawthan, I. L. R. 29 Mad. 556,* applied. *Chinnipakam Rajagopalachari* v. *Lakshmi Doss, I. L. R. 27 Mad. 241,* and *Rangayya Appa Rao* v. *Bobba Sriramulu, I. L. R. 27 Mad. 143,* referred to. Tender of patta is not a condition precedent to the maintainability of a suit under the Estates Land Act, for the recovery of arrears of rent, though such rent may have accrued due before the Act came into force. *Veerabhadra Raju* v. *Kumari Naidu, 22 Mad. L. J. 451,* followed. Even under the Rent Recovery Act (VIII of 1865) the tender of patta was not necessary to complete the landholder's right to rent, but was only a condition to be fulfilled if legal proceedings had to be instituted for the enforcement of the landholder's rights. *Appa Rao* v. *Ratnam, I. L. R. 13 Mad. 249,* followed. *Venkata Narasimha Naidu* v. *Seethayya, 9 Mad. L. T. 231,* and *Javanmal Jitmal* v. *Muktabal, I. L. R. 14 Bom. 516,* distinguished. *Gopalasawmy Mudali* v. *Mukkee Gopalier, 7 Mad. H. C. 312,* referred to: KANTHIMATHINATHA *v.* MUTHUSAMIA (1912) . . **I. L. R. 37 Mad. 540**

——— **ss. 3** (*7*), **and 6**—*Suit for resumption by a landholder against ryots—First Court's decree before the Act, in favour of the landholder—Act coming into force during appeal, effect of—Whether Estates Land Act, s. 6, retrospective—Final decree in s. 3* (*7*), *meaning of—Amaram tenure, resumable—Right of resumption when exercisable—Notice to quit—Prescription—No estoppel by receipt of rent—Improvements when tenant entitled to value of—Transfer of Property Act* (*IV of 1882*), *ss. 51 and 108* (*h*). Appeal No. 174 of 1905. If a tenant knowing that he has not a permanent occupancy right in the land in his possession makes improvements without any

MADRAS ESTATES LAND ACT (I OF 1908)—*contd.*

——— **ss. 3, 6**—*contd.*

hope or expectation in himself created or encouraged by the landlord, he cannot claim compensation for the value of such improvements. Even if the landlord knew that the tenant was making the improvements under a mistaken belief, that he had occupancy rights in the land, and merely kept quiet without interfering, there will be no estoppel against the landlord. *Ramsden* v. *Dyson, L. R. 1 H. L. 129,* and *Beni Ram* v. *Kundan Lal, I. L. R. 26 All. 496,* followed. *Mahalatchmi Ammal* v. *Palani Chetti, 6 Mad. H. C. 245,* doubted. S. 51 of the Transfer of Property Act will not apply to the case of a tenant as it cannot be said that he is a person believing in good faith to be "absolutely entitled" to the land. Neither s. 108, clause (*h*), of Transfer of Property Act, nor the Hindu, Muhammadan law nor Common Law of India is applicable to a case where the tenant, without removing the fixtures in the one case or the building erected by him in the other case, wants to recover compensation for the improvements effected by him. [Where there has been a periodical raising of the rent due by the tenants, and periodical resumptions of the tenants' lands by the landlords both of which were submitted to by the tenants without any contest, it may be concluded that the tenants have no occupancy rights. Lands held under *Amaram* tenure have generally been held to be resumable. So far as this Presidency is concerned, it would seem to be well settled that a person who has lawfully come into possession as a tenant from year to year or a term of years cannot, by setting up, however notoriously, during the continuance of such relation, any title adverse to that of the landlord, inconsistent with the legal relation between them acquire, by limitation, title as owner or any other title inconsistent with that under which he was let into possession. *Seshamma Shettati* v. *Chikaya Hegade, I. L. R. 25 Mad. 507,* followed. This doctrine is of doubtful applicability in a case where the landlord has shown by an unequivocal act that he intends to exercise his option and determine the tenancy even though he may not have succeeded in doing so. *Srinivasa Ayyar* v. *Muthusami Pillai, I. L. R. 24 Mad. 246,* referred to. It is also well established in this Presidency that if after the determination of the tenancy the tenant remains in possession as a trespasser for the statutory period, he will by prescription acquire a right as owner of such limited estate as he might prescribe for. A receipt of rent, subsequent to a notice to determine the tenancy, is consistent with the case of either party on the question as to the existence of occupancy rights as in any event there would be a liability to pay rent and it is therefore doubtful if such a receipt could be relied on as a waiver of the paintiff's right to resume. *Held,* on the facts of the present case, that there was a determination of the tenancy by a reasonable notice and that there was no assertion of an adverse title for twelve years before the suit so as to entitle the defendants to claim a

MADRAS ESTATES LAND ACT (I OF 1908) —*concld.*

——— **ss. 3, 6**—*concld.*

prescriptive right.] (The views enclosed in rectangular brackets were also stated but are no longer law as a Full Bench composed of the C. J., KRISHNASWAMI AYYAR and ALYING, JJ., decided the contrary in *Kanakayya* v. *Janardhana Padhi, I. L. R. 36 Mad. 439*, on 14th November 1910. This case is now reported for the other points decided in the case which are noted below.) [Where, during the pendency of an appeal filed by the defendants in a suit brought by a zamindar to eject his tenants, the Madras Estates Land Act of 1908 came into force, the tenants who were ordered by the decree of the First Court to be ejected, cannot take advantage of s. 6 of the Act even if that section be assumed to be retrospective, as the ryoti lands in respect of which they claimed permanent occupancy rights, would be " old waste " as defined by s. 3, clause (7), of that Act, in respect of which, before the passing of the Act, the zamindar had obtained a final decree of a competent Civil Court negativing the occupancy right.] The words " Final Decree " occurring in s. 3, clause (7), mean " final " with reference to the Court which passes the decree ; a decree is none the less final for the purposes of the section because an appeal was pending when the Act came into operation. *Quære :* Whether an appeal is a rehearing of the suit within the meaning of the Civil Procedure Code as under the Rules under the English Judicature Act so as to give retrospective effect to a statute passed after the decree of the First Court and during the pendency of the appeal. *Quære :* Whether s. 6 of the Madras Estates Land Act, 1908, is in terms retrospective. NARASAYYA *v.* RAJA OF VENKATAGIRI (1910) . . **I. L. R. 37 Mad. 1**

——— **ss. 9, 11, 151, 157 and 187** *(g)*—*Custom or contract enabling tenant to build on ryoti land, validity of.* A custom or contract entitling a ryot of agricultural land to erect buildings thereon, is not opposed to the provisions of the Madras Estates Land Act, and can be enforced against the landlord, though such erections may impair the value of the holding for agricultural purposes. The effect of such a custom is simply to make it an implied term of the contract of tenancy. MEERA KASIM ROWTHER *v.* FOULKES (1912) **I. L. R. 37 Mad. 432**

——— **s. 77**—*Madras Local Boards Act (V of 1884), ss. 73 and 74—Right of land-holder to distrain property of intermediate tenure-holder for cess paid.* Neither s. 77 of the Madras Estates Land Act, nor ss. 73 and 74 of the Madras Local Boards Act, authorizes a land-holder to levy distraint against an intermediate tenure-holder for recovering any portion of cess collected from the land-holder. LAKSHMINARASIMHAM PANTULU *v.* RAMACHANDRA MARDARAJA DEO (1912) **I L. R. 37 Mad. 319**

MADRAS FORESTS ACT (V OF 1882).

——— **ss. 26, 53 and 55**—*Compounding offence.* The words " no further proceedings shall be taken" in s. 53 of the Forests Act (Madras Act V of 1882) mean that proceedings then in progress must lapse. *Re* NARAYANA PADAYACHI (1912) **I. L. R. 37 Mad. 280**

MADRAS FORESTS ACT (V OF 1882)—*concld.*

——— **ss. 26, 53, 55**—*concld.*

MADRAS HEREDITARY VILLAGE OFFICES ACT (III OF 1895).

——— **s. 5**—*applicability of—Emolument of hereditary offices in s. 3, clause 4—Statute, construction of.* S. 5 of Madras Act III of 1895 is applicable to emoluments of hereditary offices in proprietary estates of the classes mentioned in s. 3, clause 4. *Mutyala Bapayya* v. *Kosuri Muramullu, (1912) Mad. W. N. 7*, approved. *Veerabadran Achari* v. *Suppiah Achari, I. L. R. 33 Mad. 488*, overruled. *Per* SADASIVA AYYAR, J. In cases of ambiguity as to the construction of a statute, considerations based on the scheme of the Act and the previous history of the legislation relating to the matters dealt with in the Act might properly be referred to for deciding which of two views ought to be taken. KANDAPPA ACHARY *v.* VENGAMA NAIDU (1912) . . **I. L. R. 37 Mad. 548**

MADRAS IRRIGATION CESS ACT (VII OF 1865).

——— " *River belonging to Government," meaning of—Zamindars and Rajas, rights of, to waters of rivers passing through their lands—Water, proprietary rights in, discussed—Madras Land Encroachment Act (III of 1905), effect of, upon such rights. Per* MILLER, J. In a suit for the recovery from Government of water-cess illegally levied, the cause of action arises on each occasion on which the cess is demanded and Article 131 of Schedule II of the Limitation Act does not apply. The High Court having held in *Kandukuri Mahalakshmamma Garu, Proprietrix of Urlam* v. *Secretary of State for India, I. L. R. 34 Mad. 295*, on facts similar to those relied upon in the present case, that the Vamsadhara river is a river belonging to Government, such finding was a matter of law which should be followed until overruled by a Full Bench or a higher Court. Followed accordingly. *Per* SANKARAN NAIR, J. Under the customary law of the country water belonged to the owner of the estate through which it passes, so long as the water remained on the land, subject to the claims of the proprietors below. The members of the village community and the zamindars or poligars were entitled to the water which flowed through their lands. If Government are the proprietors of the land, they are the owners of the water thereon and those rivers and streams of which they own, the bed and the banks belong to Government. It was the policy of the East India Company in granting the permanent sanads to recognise private proprietary rights and to divest themselves of such rights which may have been vested in them. It is against the policy and the spirit of the permanent settlement regulation to hold that the Government reserved to themselves any power to increase the revenue on the zamindari or to levy any assessment

MADRAS IRRIGATION CESS ACT (VII OF 1865) —*contd.*

for the use of water. The permanent sanads granted to Rajas and chieftains did not interfere with their use of the waters of natural streams for the cultivation of all lands within the *ayacut* (*i.e.*, the area of land that can be irrigated according to the customary methods) subject to the claims of the ryots. The new zamindaris created by the East India Company were placed on the same footing as the old. "Speaking generally, whenever the Government contend that these zamindars are not entitled to exercise any of the rights which are capable of private ownership, and that such rights are vested in the Crown, it lies on the Government to prove that such zamindars were deprived of them either expressly or by necessary implication under the sanads granted under that Regulation (Regulation XXV of 1802) ; the new zamindaris were placed on the same footing. The sanads referred to are those which were granted by Lord Clive, a copy of which will be found in the earlier editions of the Standing Orders of the Board of Revenue." Under the Regulation of 1802, the Government did not enter into any engagements with the landholders to supply water. The circumstances under which the permanent sanads were granted preclude any such engagement. In the case of new zamindaris created, there may be cases in which the Government reserved to themselves the control of water-courses. Act VII of 1865 was intended by the Legislature to refer to all rivers and streams in those ryotwari districts where no mirasi or any corresponding right prevailed, and the words " rivers belonging to Government " do not apply to rivers running through or by zamindaris. The Act was not intended to effect any change in the substantive law but to enable Government to levy a cess on account of the large expenditure incurred by Government in the construction and improvement of irrigation works. The ryotwari lands were assumed to be Government property ; and all rivers running through ryotwari lands were accordingly treated as belonging to Government. But it does not enable the Government to levy a water-cess where the landowners use the waters of rivers in accordance with the rights they had before. The exemption clause in s. 1 of the Act— " Where a zamindar or inamdar by virtue of engagements with the Government is entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of such right and no more "—does not apply to those zamindaris and proprietors who themselves take and are entitled to take the water for irrigation from the rivers and streams in their zamindaris without its being *supplied* to them by Government. Even if the section with the exemption clause applied, the " engagement " to be implied is one to allow the proprietors to irrigate all their lands within the *ayacut* which could be irrigated without any fee and without any charge. As Act III of 1905 does not interfere with vested rights, it cannot be used to interpret Act VII of 1865 to take away such rights. Therefore under

MADRAS IRRIGATION CESS ACT (VII OF 1865) —*concld.*

Act VII of 1865 (standing unaffected by subsequent legislation) it was not competent to the Government to levy any cess for any water taken from the Vamsadhara river without the aid of Government works. [See the end of the judgment for a summary of the conclusions.] SECRETARY OF STATE *v.* JANAKIRAMAYYA (1912) **I. L. R. 37 Mad. 322**

MADRAS LAND ENCROACHMENT ACT (MAD. III OF 1905).

See MADRAS IRRIGATION CESS ACT (VII OF 1865) . **I. L. R. 37 Mad. 322**

MADRAS LOCAL BOARDS ACT (MAD. V OF 1884).

——— **ss. 73, 74—**

See MADRAS ESTATES LAND ACT (I OF 1908), S. 77 **I. L. R. 37 Mad. 319**

MADRAS RENT RECOVERY ACT (MAD. VIII OF 1865).

——— **s. 69—**

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MADRAS REVENUE RECOVERY ACT (MAD. II OF 1864).

——— **ss. 1, 42**—*Sale for arrears of water-cess due under Madras Act VII of 1865—Discharge of encumbrances.* Under s. 42 of Madras Act II of 1864 (Revenue Recovery Act), a sale for arrears of water cess due under Madras Act VII of 1865 conveys a title to the purchaser free of encumbrances, water-cess being included in the term "public revenue " as per s. 1 of Madras Act II of 1864. Cases relating to sales for arrears of income-tax and abkari revenue have no bearing on this question. VELLAPPAYAL AMBALAM *v.* KARUPPIAH PILLAI (1911) . . **I. L. R. 37 Mad. 49**

MAGISTRATE.

——— **on tour—**

See SECURITY FOR GOOD BEHAVIOUR. **I. L. R. 41 Calc. 806**

MAHAL.

See UNITED PROVINCES LAND REVENUE ACT (III OF 1901), S. 32 (*d*). **I. L. R. 36 All. 231**

MAHOMEDAN LAW.

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MAHOMEDAN LAW—*concld.*

See KHOJAS . **I. L. R. 38 Bom. 449**

See MAHOMEDAN LAW—PRE-EMPTION.

See PRE-EMPTION.

MAHOMEDAN LAW—DIVORCE.

1. ——— *Sunni sect—Divorce—Evidence—Burden of proof.* No special form of formula is prescribed for a divorce under the Hanafia law. All that the law requires is to see that the words of divorce pronounced by a husband should show a clear intention on his part to dissolve the contract of marriage. Where witnesses depose that a divorce was effected, in their presence, it is for the party alleging the contrary to prove by cross-examination that the words used by the husband when pronouncing the divorce were insufficient and incomplete to support a valid divorce. WAHID KHAN *v.* ZAINAB BIBI (1914) **I. L. R. 36 All. 458**

2. ——— *Kabinnamah—Condition that husband should live with wife in wife's father's house as khanadamad and for divorce upon breach, if valid.* A condition in a *kabinnamah* that the husband shall live with the wife in her father's house and that if he broke this condition she would be entitled to divorce him, is invalid under the Mahomedan law, and her claim for deferred dower following upon such a divorce must fail. IMAM ALI PATWARI *v.* ARFATUNNESSA (1913) **18 C. W. N. 693**

MAHOMEDAN LAW—DOWER.

——— *Dower—Right of widow to remain in possession of her husband's property in lieu of dower.* The right of a Mahomedan widow to whom dower is due, and who has got into possession of property of her husband in lieu thereof, to remain in possession until her dower is paid may, perhaps, be descendible to her heirs : but no right to possession is descendible in a case where the widow herself never got possession at all. *Ali Bakhsh* v. *Allahdad Khan, I. L. R. 32 All. 551,* and *Bebee Bachun v. Sheikh Hamid Hossein, 14 Moo. I. A. 377,* referred to. TAHIRUNNISSA BIBI *v.* NAWAB HASAN (1912) . **I. L. R. 36 All. 558**

MAHOMEDAN LAW—GIFT.

1. ——— *Shias—Gift—Marz-ul-maut—Disease of more than one year's duration.* Under the Shia law a gift made in marz-ul-maut holds good to the extent of only one-third of the donor's estate in spite of delivery of possession prior to his death. Under the Shia law, if a person dies of a disease of more than one year's duration such disease is not considered a death-illness. But there is this condition attached to it that if the illness increases to such an extent as to cause, or another supervenes which causes, an apprehension of death in the mind of the donor the increase or the new disease is a death-illness. The nature of the gift does not change even if the donor had intended prior to death-illness to transfer the property to the donee. KHURSHED HUSAIN *v.* FAIYAZ HUSAIN (1914) **I. L. R. 36 All. 289**

MAHOMEDAN LAW—GIFT—*concld.*

2. ——— *Gift—Revocation—Substantial alteration of subject-matter—Partition. Held,* that a Revenue Court partition of villages, the subject of a deed of gift, does not amount to such a substantial alteration of the subject-matter in the hands of the donee as would, under the Mahomedan law, render the gift irrevocable by the donor. MAQBUL HUSAIN *v.* GHAFUR-UN-NISSA (1914) . . **I. L. R. 36 All. 333**

MAHOMEDAN LAW—GUARDIAN.

1. ——— *Guardians and Wards Act (VIII of 1890), ss. 9 and 39—Application for appointment as guardian of minor girl—Qualifications for applicant. Held,* that the husband of a minor girl's sister is not, under the Mahomedan law, entitled to be appointed a guardian of the person or property of the minor. *Held,* also, that the Guardians and Wards Act, 1890, contemplates that an applicant for guardianship should reside within the jurisdiction of the Court to which he makes the application. ASGHAR ALI *v.* AMINA BEGAM (1914) . . . **I. L. R. 36 All. 280**

2. ——— *Shia sect—Guardian and minor—Right to guardianship of female minor.* According to the Mahomedan law applicable to the Shia sect, the right to the guardianship of a female minor rests primarily with the mother ; on her death with the father, and only on the death of the father does the right pass to the maternal grandmother and other ascendants. SALIM-UN-NISSA *v.* SAADAT HUSAIN (1914) **I. L. R. 36 All. 466**

3. ——— *Guardianship—Mahomedan infant—Mahomedan law—Maternal uncle if a proper guardian—Sister's husband, if qualified—Prohibited degress of relationship—Adverse interest—Guardians and Wards Act (VII of 1890).* Under the Mahomedan law no male has a right to the custody of a female child, unless he is a Mahram, that is, one who stands to her within the prohibited degrees of relationship and cannot under any circumstances marry her. A maternal uncle may be appointed as a guardian to a Mahomedan minor girl. When the girl was married to a person below her station in life, the Court ordered a governess to be appointed to stay with her until puberty, the husband not to have access to her meanwhile, so that the girl might have liberty to repudiate the marriage if she liked just on the attainment of puberty. HURUNNESSA BIBEE, *In the matter of* (1913) . . **18 C. W. N. 853**

MAHOMEDAN LAW—MINOR.

——— *Minor—De facto guardian's powers over minor's properties—Sale by mother for expenses of minor's sister's marriage, or for the discharge of proper family debts, not binding.* Under the Mahomedan law the general rule is that the dealings of a *de facto* guardian of a minor with the minor's properties do

MAHOMEDAN LAW—MINOR—*concld.*

not *ipso facto* bind the minor. The rule is, however, subject to exceptions. In cases of urgent and imperative necessity, or where the transaction from its nature must necessarily be beneficial to the minor, a *de facto* guardian can alienate the property of the minor, whether moveable or immoveable. According to Mahomedan law, sale of a minor's property by an unauthorized guardian, even if it was not made for a valid cause, is neither void nor voidable in the ordinary sense of the terms, but is regarded as *manguf* or dependent, that is, in a state of suspense, its validity or invalidity being determined by the minor adopting or not adopting after he has attained majority, though the effect of his decision will relate back to the date of inception of the transaction. A person who chooses to buy a minor's property from a person who has no power to deal with it, however *bonâ fide* his action may have been, cannot invoke any principles of justice and good conscience to support the transaction itself, though such considerations may be a good ground for the Court refusing to give relief to the minor except on condition of his restituting whatever benefit he has derived from the transaction. A sale by a mother of the minor's property for finding money for the marriage expenses of the minor's sisters or for the discharge of family debts and for other family purposes, is not binding on the minor. AYDERMAN KUTTI *v.* SYED ALI (1912)

I. L. R. 37 Mad. 514

MAHOMEDAN LAW—PRE-EMPTION.

1. ——— *Pre-emption—Shafa, right of—Delay in assertion—Waiver—Right of pre-emption, accrual of—General law to govern the incident of sale in applying the law of pre-emption and not the pure Mahomedan law.* *Per* CARNDUFF, J. The right of *shafa* cannot arise until there has been a sale to a third party, for the right of *shafa*, recognised by the Mahomedan law, is not the right of pre-emption known to the Roman law ; that is to say, the right arising out of an obligation on the part of an intending vendor to sell preferentially to the obligor if he offers as good conditions as any intended vendee, but rather the obligation attached to a particular status, which binds the purchaser from the person obliged to hand over the subject-matter to the other party to the obligation on receiving the price paid by him for it. The right accrues only when the property has passed from the original owner to a purchaser. The general law, which is paramount and has superseded the Mahomedan law, should govern the incident of sale in applying the law of pre-emption. *Per* RICHARDSON, J. Where possession is not given and the price is not paid till registration, the right of pre-emption arises upon registration and not before. *Jadu Lall Sahu* v. *Janki Koer, I. L. R. 35 Calc. 575*, referred to. *Begum* v. *Muhammad Yakub, I. L. R. 16 All. 344, Ladun* v. *Bhyro Ram, 8 W. R 255, Najm-un-nissa* v. *Ajaib Ali Khan, I. L. R. 22 All. 343, Ojeeonissa Begam* v. *Rustam Ali, (1864) W. R. 219, Torul Komhar* v. *Mussamut Achhee, 18 W. R. 401, Kooldeep* v. *Ram Deen Singh, 24 W. R. 198, Sheo Tahul* v. *Ramkooer, (1864) W. R. 311, Brojo Kishore* v. *Kirtee Chunder, 15 W. R. 247, Jehanjir* v. *Lala Bhikari, 6 B. L. R. 42 note, Kanhai Lal* v. *Kalka Prasad, I. L. R. 27 All. 670*, discussed. BUDHAI SARDAR *v.* SONAULLAH MRIDHA (1914)

I. L. R. 41 Calc. 943

MAHOMEDAN LAW—PRE-EMPTION—*concld.*

2. ——— *Right of pre-emption—Litigation between Hindus—Adoption of pre-emption as usage—Burden of proof—Ancient and invariable custom—Pre-emption, a personal right not descendible to heirs—A custom cannot be proved by the admission of parties or their counsel.* In litigation between Hindus where one party alleges the adoption of a whole branch of the Mahomedan law, such as that of pre-emption, and the other party repudiates the application of the foreign law, it lies very heavily on the party alleging to prove that that law has been adopted as a usage and could be proved to have been so adopted by proof of ancient and invariable custom. Such a party must stand or fall by the strict Mahomedan law of pre-emption. Generally speaking the right of pre-emption is a personal right which, under the Mahomedan law, would not descend to heirs. *Per* MACLEOD, J. A custom must be proved by evidence in the first instance and once it is proved the Courts are entitled to recognize its existence. A custom cannot be proved by the admission of the parties or their counsel before the Court. DAHYABHAI MOTIRAM *v.* CHUNILAL KESHORDAS (1913) . . . **I. L. R. 38 Bom. 183**

MAHOMEDAN LAW—WAKF.

——— *Shia Sect—Wakf—Marz-ul-maut—Validity of wakf made in marz-ul-maut.* Under the Shia law a wakf made in death-illness is valid only to the extent of one-third if not assented to by the heirs, even if possession has been delivered by the maker of the wakf. *Nazar Husain* v. *Rafeeq Husain, 8 All. L. J. 1154*, approved. ALI HUSAIN *v.* FAZAL HUSAIN KHAN (1914)

I. L. R. 36 All. 431

MAINTENANCE.

See CIVIL PROCEDURE CODE (1908), O. II, R. 5 . . **I. L. R. 38 Bom. 120**

See CRIMINAL PROCEDURE CODE (1898), S. 488 (*1*) . **I. L. R. 37 Mad. 565**

See HINDU LAW—MAINTENANCE.

See PARSIS . **I. L. R. 38 Bom. 615**

——— *Liability of estate of deceased person for arrears of maintenance accrued prior to death—Abatement of order for maintenance after death—Criminal Procedure Code (Act V of 1898), s. 488 (1), (3), (6).* A claim for arrears of maintenance abates on the death of the person against whom an order under sub-s. (*1*) of s. 488 of the Criminal Procedure Code has been made, and cannot be enforced thereafter against his estate. *Semble ;* Before a warrant is issued under sub-s. (*3*), wilful neglect to comply with the order must be

MAINTENANCE—*concld.*

found, and for that purpose evidence has to be taken under sub-s. (*6*) in the presence of the accused. EAD ALI *v.* LAL BIBI (1913) **I. L. R. 41 Calc. 88**

MAJORITY ACT (IX OF 1875).

——— **s. 3—**

See PENAL CODE (ACT XLV OF 1860), S. 363 . . **I. L. R. 37 Mad. 567**

MALABAR LAW.

See MORTGAGE . **I. L. R. 37 Mad. 420**

MALICIOUS PROSECUTION.

——— *'Prosecution,' what amounts to—Magistrate sending only notice but not summons or warrant and dismissing complaint, no prosecution—Criminal Procedure Code (Act V of 1898), s. 202.* Where on receiving a complaint of an offence of defamation, a Magistrate issued only a notice but not a summons or a warrant to the accused, which notice simply informed him that a preliminary enquiry would be held at a certain time in the matter of the complaint preferred by the complainant, and the complaint was dismissed under s. 202, Criminal Procedure Code, after hearing counsel for both parties: *Held*, that there was no prosecution of any offence by the complainant so as to give room for any suit for malicious prosecution. *DeRozario* v. *Gulab Chand Anundjee, I. L. R. 37 Calc. 358, Golap Jan* v. *Bholanath Khettry, I. L. R. 38 Calc. 880*, followed. Sending such notice and the hearing thereon are not authorized by the Criminal Procedure Code. Prosecution commences with the issue of process (summons or warrant) after the complaint has been entertained by the Magistrate and that the prior proceedings constitute at most an attempt by the complainant to prosecute the accused. SHEIK MEERAN SAHEB *v.* RATNAVELU MUDALI (1912) **I. L. R. 37 Mad. 181**

MANAGEMENT.

——— **scheme of—**

See TRUST . **I. L. R. 41 Calc. 19**

MANAGER.

See HINDU LAW—MANAGER.

——— **in a joint Hindu family—**

See LIMITATION ACT, 1908, S. 7 ; SCH. I, ART. 44 . . **I. L. R. 38 Bom. 94**

MANAGING MEMBER.

See JOINT HINDU FAMILY. **I. L. R. 36 All. 158**

——— **contract by—**

See SPECIFIC RELIEF ACT (I OF 1877), S. 15 . . **I. L. R. 37 Mad. 387**

MANDAMUS.

See UNIVERSITY LECTURERSHIP. **I. L. R. 41 Calc. 518**

MANDATORY INJUNCTION.

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXIX, R. 2. **I. L. R. 38 Bom. 381**

MARKET VALUE.

See LAND ACQUISITION. **I. L. R. 41 Calc. 967**

MARRIAGE EXPENSES.

——— **of male members—**

See HINDU LAW—JOINT FAMILY. **I. L. R. 37 Mad. 273**

MARRIED WOMAN.

——— **enticing away a—**

See PENAL CODE (ACT XLV OF 1860), S. 468 . **I. L. R. 36 All. 1**

MARRIED WOMEN'S PROPERTY ACT (III OF 1874).

——— **ss. 2, 4, 6**—*Hindu effecting a policy of life insurance for benefit of wife and children—Policy money if available for his debts on death—Statute, application of, leading to anomaly—Interpretation.* A policy of life insurance effected by a Hindu for the benefit of his wife and children is not governed by the provisions of s. 6 of the Married Women's Property Act of 1874. *Per* RICHARDSON, J. Although s. 2 of the Act expressly provides that nothing in the Act applies to any married woman who at the time of her marriage professed the Hindu amongst other religions, or whose husband at the time of such marriage professed that religion and does not expressly exempt their children from the operation of the Act, the intention of the Legislature, taking the Act as a whole, is to exclude the children also from the benefits of s. 6 of the Act. If the words of an Act are so plain that no other construction is reasonably possible the anomaly must be accepted and effect must be given to the language which the Legislature has chosen to employ. But if the language is of doubtful import, the most reasonable construction of which it is fairly capable ought to be adopted. *Held, per* CURIAM, that the money due under the policy in question formed part of the estate of the assured and was available for payment of his debts after his death. ESHANI DASI *v.* GOPAL CHANDRA DEY (1914) . . . **18 C. W. N. 1335**

——— **s. 6**—*Applicability to Hindus—Insurance—Policy for the benefit of wife and children, if creates a trust—Policy amount payable to the executors, administrators and assigns of the assured—Right of beneficiary to enforce—Presumption of advancement.* Where a Hindu male effected a policy of insurance on his own life, expressed on the face of it to be for the benefit of his wife, or his wife and children or any of them, but payable to his executors, administrators and assigns, and died leaving a daughter: *Held*, by the Full Bench, that s. 6 of the Married Women's Property Act (III of 1874) applied to the case, and by virtue thereof a trust was created in favour of the daughter, in regard to

MARRIED WOMEN'S PROPERTY ACT (III OF 1874)—*concld.*

——— **s. 6**—*concld.*

the policy amount, against which the creditors of the assured have no right to proceed. *Oriental Government Security Life Assurance, Limited* v. *Vanteddu Ammiraju, I. L. R. 35 Mad. 162*, overruled. *Per* WHITE, C. J. (SANKARAN NAIR, J., concurring). Ss. 4, 5, 6, 7, 8 and 9 of Act III of 1874 do not apply where either of the spouses, at the time of the marriage, professed the Hindu religion. The primary object of s. 6 is to enable a man (though a Hidnu male) to make provision for his wife and children by insuring his life for their benefit without executing a separate deed of trust, though the result may be that a Hindu woman derives a benefit thereby. *Per* WHITE, C.J. S. 6 does not affect the law of contract or the law of trust as regards the persons entitled to enforce the contract under the policy. The person entitled to enforce the rights of the beneficiary is the trustee, if a trustee has been appointed, and if no special trustee has been appointed, the Official Trustee, to whom the money is payable, and not the daughter, the beneficiary. *Held*, also, that the daughter was not entitled to enforce her claim against the insurance company or as against a creditor as (i) the company was under a contractual obligation to pay the amount to the executor or administrator of the assured, and (ii) the presumption of advancement of a daughter was rebutted by the words "for the benefit of his wife and children," the policy not being one for the benefit of such of the children as are daughters. *Per* TYABJI, J. The daughter's right under the insurance policies is affected by s. 6 of Act III of 1874, and the operation of s. 6 is not prevented by s. 2. For the daughter is not a married woman within the meaning of ss. 2 and 6, though she may be married, as the expression 'married woman' cannot refer to any woman other than one who is married to the assured. BALAMBA *v.* KRISHNAYYA (1913)

I. L. R. 37 Mad. 483

MARZ-UL-MAUT.

See MAHOMEDAN LAW—GIFT.

I. L. R. 36 All. 289

See MAHOMEDAN LAW—WAKF.

I. L. R. 36 All. 431

MATE'S RECEIPTS.

See CONTRACT . **I. L. R. 41 Calc. 670**

MEMORANDUM OF APPEAL.

See CIVIL PROCEDURE CODE (ACT V OF 1908), SS. 107, 149, O. VII, R. 11, CL. (*c*).

I. L. R. 38 Bom. 41

MERGER.

——— *Mokurari tenure specially registered under Act XI of 1859 granted by the zemindar—Subsequent grant of putni by the zemindar—Purchase of putni and mokurari by the same person—Merger—Transfer of Property Act, ss. 2 (c), 111 (d), 117.* Where a *mokurari* tenure has all along been treated as a distinct sub-tenure, there

MERGER—*concld.*

was no merger by the acquisition of a *putni* tenure and the *mokurari* tenure by the same person, apart from the provisions of the Transfer of Property Act. *Woomesh Chander Goopto* v. *Raj Narain Roy, 10 W. R. 15, Thomas Savi* v. *Punchanon Ray, 25 W. R. 503, Prosunno Nath Roy* v. *Jagat Chunder Pundit, 3 C. L. R. 159*, referred to. *Jibanti Nath Khan* v. *Gokool Chunder Chowdhury, I. L. R. 19 Calc. 760*, followed. *Surja Narain Mandal* v. *Nanda Lal Sinha, I. L. R. 33 Calc. 1212, Ulfat Hossain* v. *Gayani Dass, I. L. R. 36 Calc. 802*, distinguished. Where a person acquires the superior and the subordinate interests piecemeal at different times, but ultimately the entire interest of the lessor and the lessee are vested in the same person at any point of time, there is a merger of the two interests in any case to which the provisions of s. 111 (*d*) of the Transfer of Property Act are applicable. A *mokurari* was created before the passing of the Transfer of Property Act and a *putni* was granted of the zemindary within which the *mokurari* was created. Afterwards in 1886 the entire *putni* and the entire *mokurari* were acquired by the same person. *Held*, that the provisions of s. 111 (*d*) of the Transfer of Property Act do not apply and there was no merger of the *mokurari* interest in the *putni* interest. *Promotho Nath Mitter* v. *Kali Prosonno Chowdhury, I. L. R. 28 Calc. 744*, followed. *Ulfat Hossain* v. *Gayani Dass, I. L. R. 36 Calc. 802*, explained. HIRENDRA NATH DUTT *v.* HARI MOHAN GHOSH (1914)

18 C. W. N. 860

MESNE PROFITS.

——— *Application to assess—Limitation—Decree for mesne profits, application for execution of, by assignee—Right of assignee to apply for substitution in pending suit, nature of—Application for ascertainment of mesne profits in pending suit, limitation applicable to—Benamidar, if may apply—Assignee from assignee of party to suit, application for substitution by—Claim for mesne profits, if can be transferred—Stranger if may question assignment—Civil Procedure Code, O. XX, r. 12; O. XXII, r. 10—Limitation Act (IX of 1908), Art. 181.* A *durputni* held by three brothers, *D*, *P* and *R*, was sold for rent and purchased by the *putnidar*. One of the three brothers, *D*, brought a suit and obtained a decree for the recovery of possession of the *durputni* and mesne profits. After *D's* death his widow got herself substituted in his place and in execution of the decree took possession of the property and subsequently a deed was executed between herself and the two other brothers *P* and *R* in terms that the property belonged to the three brothers and she as the widow of the eldest was entitled to two annas and the remaining 14 annas were divided between her and the two brothers in equal shares as also the mesne profits. The *durputni* was thereafter sold in execution of a money-decree and ultimately passed into the hands of one *A*. On 21st May 1907 the two brothers *P* and *R* by a conveyance assigned their share of the costs and mesne profits under the decree obtained by *D* to *M*, a *benamidar* of *A*, and on the 10th June 1907

MESNE PROFITS—*concld.*

D's widow by another conveyance assigned her share of the mesne profits and costs to *A*. On 22nd February 1909 *A* applied for execution of the decree and the application was admitted by the Subordinate Judge, but under orders of the District Judge in appeal the application was returned for amendment on 4th March 1911 and amended on the same day. On appeal, the High Court directed that this application presented by *A* should be treated as an application under O. XX, r. 12, and remanded the case, whereupon the amended application was placed on the record to be dealt with under O. XX, r. 12, and *A* was substituted on the record in place of the original plaintiff. *Held*, that the application should be treated as having been made on the date on which it was originally presented and that date being within 3 years of the dates of the conveyances assigning mesne profits and costs to *A*, the application was not barred even if Art. 181 of the Limitation Act was applicable. That even if the application was considered as having been made on the date on which it was amended, the right of the assignee to apply for substitution in a pending suit is a right which accrues from day to day and is therefore not barred by limitation. That an application in a pending suit for ascertainment of mesne profits is not barred by the three years' rule of limitation contained in Art. 181 corresponding to Art. 178 of the old Limitation Act. The law has not been changed by the new Limitation Act or the new Code of Civil Procedure. *Puran Chand* v. *Rai Radha Kishen, I. L. R. 19 Calc. 132*, followed. *Held* (as to the contention that *A* could not be substituted when his two assignees *P* and *R* were not parties to the suit), that the property being the joint property of the three brothers and the suit having been brought by *D* as the eldest member of the family, he might be taken to have represented the other two brothers also. That even if *P* and *R* were considered as assignees from *D's* widow, the position was that *A* was an assignee from *D's* widow who was a party to the suit with respect to one-third of the property, and an assignee from *P* and *R*, who in their turn were assignees from *D's* widow with respect to two-thirds, and O. XX, r. 10, was applicable to an application made by a person who has not obtained an assignment directly from a party to the suit but who has obtained an assignment derivatively from a party to the suit. That a right to sue for damages cannot be transferred, but in the present case the claim for mesne profits had already merged in a judgment before the assignment and the right under the judgment was assignable although the original cause of action was not. There is nothing in law to prevent a *benamidar* from applying to the Court for ascertainment of mesne profits. A stranger cannot take exception to an assignment on the ground of inadequacy of consideration, that being a matter between the assignor and assignee. *Bhagwat Dayal* v. *Debi Dayal, I. L. R. 35 Calc. 420 : s. c. 12 C. W. N. 393*, relied on. PRASANNO KUMAR PANJA *v.* ASHUTOSH RAY (1913) **18 C. W. N. 450**

MILITARY OFFICER.

——— in the Indian Staff Corps—

See CIVIL PROCEDURE CODE (ACT V OF 1908), S. 60, CL. 2 (*b*).
I. L. R. 38 Bom. 667

MINING LEASE.

See LANDLORD AND TENANT.
I. L. R. 41 Calc. 493

MINOR.

See CONTRACT . **I. L. R. 37 Mad. 390**

See JOINT HINDU FAMILY.
I. L. R. 36 All. 158

See LIMITATION ACT, 1908, S. 7 ; SCH. I, ART 44 . **I. L. R. 38 Bom. 94**

See MAHOMEDAN LAW—MINOR.

——— a decree for land and mesne profits in favour of—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), S. 230.
I. L. R. 37 Mad. 186

1. ——— *Appointment of Guardian—Custody—Plaint in District Court—Transfer to High Court—Jurisdiction—Letters Patent, 1865, cls. 13 and 20—Guardians and Wards Act (VIII of 1890), ss. 9, 10 and 52.* The first respondent instituted a suit against the appellant in a District Court by a plaint claiming a declaration that he was entitled to the guardianship and custody of his two minor sons (the added respondents) and for an order that they should be handed over to him. The suit having been transferred to the High Court under the Letters Patent, 1865, s. 13, that Court declared that the minors should be wards of the Court, that the first respondent was guardian of their persons, and ordered the appellant to hand them over to him. The minors were in England both when the suit was instituted and when the order was made ; they were not made parties to the proceedings, nor were they represented before the Court. *Held*, (i) that the District Court had no jurisdiction, since the minors were not ordinarily resident in the district, as required by s. 9 of the Guardians and Wards Act, 1890, and since the suit was not instituted by petition, as required by s. 10 of that Act ; (ii) that, even if the High Court had any jurisdiction with regard to minors beyond that which might have been exercised by the District Court (which was not determined), the mandatory order ought not to have been made, since an attempt to inforce it would expose the appellant to *habeas corpus* proceedings in England, and since the minors were not represented before the Court, nor adequate steps taken to ascertain their wishes and interests. BESANT *v.* NARAYANIAH (1914) . . . **L. R. 41 I. A. 314**

2. ——— *Guardian ad litem appointment of, procured by suppression of the existence of near relation—Whether decree liable to be set aside—Fraud.* In a suit for the recovery of money against a father and his minor son, the father refused to act as guardian *ad litem* of his minor, whereupon the Court appointed its Head

MINOR—*concld.*

Clerk as guardian on the affidavit of the plaintiff that there was no fit and proper person alive to act as the guardian of the minor, while as a matter of fact the plaintiff knew that the minor was living under the protection of his maternal grandfather. The decree passed in this suit was sought to be set aside by the minor on the ground of fraud. *Held*, that the statement in the affidavit could not be held to be deliberately false so as to constitute fraud, in the absence of any allegation of collusion between the plaintiff and the Head Clerk, and the decree could not be set aside unless there was no appointment of a guardian *ad litem* or the appointment was induced by fraud or what the Court would regard as tantamount to fraud. *Hanuman Prasad* v. *Muhammad Ishaq, I. L. R. 28 All. 137, Ramchandra Das* v. *Joti Prasad, I. L. R. 29 All. 675,* and *Babaji bin Kusaji* v. *Maruti, 11 Bom. H. C. 182,* distinguished. MARUTHAMALAI *v.* PALANI (1912) . . . **I. L. R. 37 Mad. 535**

MINORITY.

———— of Mahomedan when to cease—

See PENAL CODE (ACT XLV OF 1860), S. 363 . . **I. L. R. 37 Mad. 567**

MISDELIVERY.

See CARRIERS . **I. L. R. 41 Calc. 703**

MISDIRECTION.

See CHARGE TO JURY. **I. L. R. 41 Calc. 1023**

MISJOINDER.

See CHARGE **I. L. R. 41 Calc. 66, 722**

MISJOINDER OF CAUSES OF ACTION.

See CIVIL PROCEDURE CODE (1908), O. II, R. 5 . . **I. L. R. 38 Bom. 120**

MISJOINDER OF CHARGES.

See EXCISE . **I. L. R. 41 Calc. 694**

MISJOINDER OF PARTIES.

See CIVIL PROCEDURE CODE (1908), O. 1, R. 3 . . **I. L. R. 36 All. 406**

MISTAKE.

See REGISTRATION. **I. L. R. 41 Calc. 972**

See SALE IN EXECUTION OF DECREE. **I. L. R. 41 Calc. 590**

———— *Mistake, evidence of*—*Similar mistake in other documents—Admissibility—Concurrent finding of fact, based on no evidence.* The proper description of houses in towns for the purpose of registration is by the street in which they are situated and the number which they bear in that street. Where a stranger to a mortgage-decree passed in the Original Side of the High Court, who had previous thereto acquired a title in property actually intended to be conveyed (all of which was outside Calcutta), proved

MISTAKE—*concld.*

that there was no property in Calcutta bearing the street, name and number given to the only item of Calcutta property included in the mortgage, and that the property in Calcutta, which in fact answered the description of that property by metes and bounds given in the mortgage deed, did not belong to the mortgagor: *Held*, that the onus of proving (as it was open to him to prove) that there was a clerical or other error in the description of the property and that in fact an existing property situated in Calcutta was intended by both parties to be mortgaged, was on the mortgagee decree-holder. That to prove this the motrgagee should have examined himself as also his mortgagor. That as no evidence whatever was given to prove this case, it was not open to the Courts in India to come to the conclusion that the entry of the property was a mistake. Evidence to show that the mortgagor had purported to mortgage with other mortgagees the same property under the same description and had been compelled by them to consent to rectification, was irrelevant at the trial to prove that the entry in the document was a mistake. That the principle of concurrent findings of fact did not apply to such a case as it was a case of no evidence, and it was open to the Privy Council to hold from the conduct of the mortgagee in not examining himself or his mortgagor and from other evidence in the case, that the entry was intentionally fictitious. HARENDRA LAL ROY CHOWDHURI *v.* HARI DASI DEBI (1914) **18 C. W. N. 817**

MITAKSHARA.

See HINDU LAW—SUCCESSION. **I. L. R. 38 Bom. 438**

MOFUSSIL MAGISTRATE.

See CONTEMPT OF COURT. **I. L. R. 41 Calc. 173**

MONEY.

———— suit for—

See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SCH. II, ART. 3. **I. L. R. 37 Mad. 533**

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MORTGAGE.

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See CIVIL PROCEDURE CODE (1908), S. 34, O. XXXIV, RR. 2 AND 4. **I. L. R. 36 All. 220**

See CIVIL PROCEDURE CODE (1908), O. II, R. 2 ; O. XXXIV, R. 14. **I. L. R. 36 All. 264**

See EXPROPRIETARY TENANT. **I. L. R. 36 All. 248**

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See REGISTRATION. **I. L. R. 41 Calc. 972**

See SONTHAL PARGANAS—JURISDICTION. **L. R. 41 I. A. 197**

See TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 58 AND 100. **I. L. R. 36 All. 201**

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See TRANSFER OF PROPERTY ACT (IV OF 1882), S. 82 . **I. L. R. 36 All. 272**

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——— **by Hindu widow—**

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——— **redemption of—**

See LIMITATION ACT (XV OF 1877), SCH. II, ART. 148 . **I. L. R. 36 All. 195**

——— **suit for—**

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. V, R. 5. **I. L. R. 38 Bom. 377**

——— **suit to enforce—**

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——— **suit upon—**

See GUJARAT TALUKDARS ACT (BOM. ACT VI OF 1888 AS AMENDED BY BOM. ACT II OF 1905), SS. 29, 29B (*1*), (*2*), (*3*) AND 29E . **I. L. R. 38 Bom. 604**

1. CONSIDERATION.

——— *Consideration—Recita in mortgage deed of receipt of consideration—Burden of proof.* Where a mortgage deed is proved to have been executed and the document contains an acknowledgment of the receipt of the consideration, this is strong *primâ facie* evidence that the consideration has been actually received and is evidence not only against the mortgagors, but also against persons claiming under them subsequent to the date of the mortgage. The mere fact that a Court was not satisfied with the evidence which the plaintiff adduced in addition to the acknowledgment, would not absolve the defendants from producing evidence that, notwithstanding the acknowledgment in the body of the deed, there was no consideration in fact. BABBU *v.* SITA RAM (1914) . . . **I. L. R. 36 All. 478**

MORTGAGE—*contd.*

1. CONSIDERATION—*concld.*

2. ESTOPPEL.

——— *Estoppel—Purchase of mortgaged property by mortgagee in execution of his decree for sale—Subsequent suit for sale by a prior mortgagee—Plea of incompetence of mortgagor raised by mortgagee—Purchaser. Held,* that a mortgagee who, in execution of a decree for sale in his favour, has purchased the mortgaged property himself, could not be permitted, in another suit on a prior mortgage of the same property in which he was arrayed as defendant, to set up the defence that the mortgagor was incompetent to execute the mortgage in suit. *Bishumbhar Dayal* v. *Parshadi Lal, 10 All. L. J. 112, Bakhshi Ram* v. *Liladhar, I. L. R. 35 All. 353,* and *Prayag Raj* v. *Sidhu Prasad Tiwari, I. L. R. 35 Calc. 877,* referred to. *Radha Bai* v. *Kamod Singh, I. L. R. 30 All. 38,* distinguished. TOTA RAM *v.* HAR GOBIND (1913) . . . **I. L. R. 36 All. 141**

3. FRAUD.

——— *Suit to recover the amount due—Defendant's plea that the mortgage was effected to defraud his creditor—Attachment of the property by the creditor—Order for sale subject to the mortgage—Creditor paid off before sale—Decree for plaintiff on the ground that defendant cannot plead his own fraud—Fraud not carried out—Defendant's intention not punishable.* The plaintiff sued to recover from the defendant the amount due under a mortgage. The defendant pleaded that the mortgage deed was effected to protect his property from his creditor and that no consideration really passed under the deed. Previous to the suit the defendant's creditor had attached the mortgaged property, and the mortgagee (present plaintiff) had made a claim on the basis of the mortgage for the release of the property from attachment. The mortgagor (present defendant) admitted the mortgage and the property was ordered to be sold subject to the mortgage. But the property was, however, not sold because the mortgagor paid off his creditor before the order for sale was carried into effect. Both the lower Courts decreed the claim on the ground that the defendant could not be allowed to defeat the plaintiff by pleading his own fraud. On second appeal by the defendant: *Held,* setting aside the decree, that as the defend-

MORTGAGE—*contd.*

3. FRAUD—*concld.*

ant's creditor had not been defrauded, there was no reason why the Court should punish his intention to defraud by passing a decree against him. *Sidlingappa* v. *Hirasa, I. L. R. 31 Bom. 405*, explained and distinguished. *Ram Surun Singh* v. *Pran Peary, 13 Moo. I. A. 551*, referred to. GIRDHARLAL PRAYAGDATT *v.* MANIKAMMA (1913)

I. L. R. 38 Bom. 10

4. PARTIES.

———————— *Hindu law—Mortgagee holding an usufructuary and a simple mortgage over the same property—Suit by the mortgagee as kurta of joint Hindu family on later mortgage alone—Maintainability—Non-joinder of necessary party—Transfer of Property Act (IV of 1882), ss. 85, 99—Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 1, 14.* Where the *kurta* of a joint Hindu family, who was the holder of an usufructuary and a simple mortgage, brought a suit on the latter without joining as party one of the members of the family, who had a joint interest with him in the usufructuary mortgage : *Held*, that under the terms of s. 85 of the Transfer of Property Act and O. XXXIV, r. 1, of the Civil Procedure Code, the plaintiff was bound to make him a party. *Hori Lal* v. *Munman Kunwar, I. L. R. 34 All. 549*, and *Madan Lal v. Kishan Singh, I. L. R. 34 All. 572*, not followed. *Lala Surja Prosad* v. *Golab Chand, I. L. R. 27 Calc. 724 ; 28 Calc. 517*, followed. DEBI PRODSAD SAHI *v.* DHARAMJIT NARAYAN SINGH (1914) . **I. L. R. 41 Calc. 727**

5. REDEMPTION.

1. ———————— *Purchase by mortgagees of part of mortgaged property—Tender of proportinate part of mortgage money by purchasers of the residue—Tender refused on ground of subsequent mortgages affecting the property—Suit for redemption—Form of decree.* Tender of payment under s. 83 of the Transfer of Property Act was made by the purchasers of part of the property comprised in a mortgage (the rest of the property having been purchased by the mortgagees themselves) who paid into Court what they believed to be the proportionate amount due on the share purchased by them, and within the period limited by the mortgage-deed. This tender was, however, refused upon the ground that there were two subsidiary mortgages affecting the property under which further sums were due. The mortgagors thereupon brought a suit for redemption expressing their readiness to pay what might be found by the Court to be the proper proportionate amount due by them in respect of the property which they had purchased. *Held*, on the finding, that the plaintiffs when they made their original tender were unaware of the existence of the two subsidiary bonds, that the Court below was right in giving a decree for redemption on payment of the amount due under the three mortgages in respect of the share purchased by the plaintiffs and for possession at the corresponding period of the following year. NARSINGH SINGH *v.* ACHCHAIBAR SINGH (1913) . . . . **I. L. R. 36 All. 36**

MORTGAGE—*contd.*

5. REDEMPTION—*contd.*

2. ———————— *Prior and puisne incumbrancers—Suit for sale by prior incumbrancer without impleading puisne incumbrancer—Subsequent suit by puisne incumbrancer for sale—Form of decree.* Where a prior incumbrancer sues for sale on his mortgage and brings the mortgaged property to sale without making a puisne incumbrancer party to his suit, and thereafter the puisne incumbrancer brings a suit for sale on his mortgage, the proper decree to be made in the second suit is to direct a calculation of what was due on foot of the prior incumbrancer up to the date of the taking over of possession upon sale, or, if that date cannot be ascertained, the date of the sale, and to declare the puisne incumbrancer entitled to redeem upon payment of the amount so ascertained. *Dip Narain Singh* v. *Hira Singh, I. L. R. 19 All. 527*, *Phulmani Chaudhrain* v. *Nageshar Prasad, I. L. R. 33 All. 370*, and *Manohar Lal* v. *Ram Babu, I. L. R. 34 All. 323*, referred to. RAGHUNATH KUNWAR *v.* SHANKAR SINGH (1913)

I. L. R. 36 All. 123

3. ———————— *Redemption—Condition intended to defeat the right of redemption—Condition held to be unenforceable.* A Court of Equity will not permit any device or contrivance designed or calculated to prevent or impede redemption, although it may be impossible to lay down any general rule as to what should not be regarded as an improper restraint or fetter on the right of redemption. Where a mortgage was made for forty years and a provision was inserted in the deed fixing a particular day on which it was to be redeemed, failing which the mortgage was to be renewed for another term of forty years, and it was further provided that the mortgage should not be redeemed with borrowed money, it was *held* that these provisions were desinged to make redemption very difficult, if not impossible, and should not be enforced. *Bansi* v. *Girdhar Lal, All. Weekly Notes (1894), 143*, and *Rambaran Singh* v. *Ramker Singh, 10 Indian Cases, 243*, referred to. SARBDAWAN SINGH *v.* BIJAI SINGH (1914)

I. L. R. 36 All. 551

4. ———————— *Prior and subsequent mortgagees—Suit on prior mortgage to which the subsequent mortgagee not a party—Subsequent mortgagee obtaining decree on his mortgage in absence of first mortgagee—Sale of property subject to first mortgage—Subsequent mortgagee purchasing property with permission of Court—Execution of decree by first mortgagee—Subsequent mortgagee can ask the mortgage amount of first mortgage to be determined again—By purchase subsequent mortgagee does not lose his rights under his mortgage—Extinguishment of mortgage—Transfer of Property Act (IV of 1882), s. 101.* In 1886 certain property was mortgaged to *V*. It was again mortgaged by the same mortgagors to *H* in 1887. In 1892 *V*

MORTGAGE—*contd.*

5. REDEMPTION—*contd.*

obtained a decree on his mortgage. *H* was not made a party to the suit. *V* having sold his rights, his assignee *K* obtained another decree in 1896 against the mortgagors on the mortgage and other debts. To this suit also *H* was not a party. In 1895 *H* sued on his own mortgage without making the first mortgagee a party. A decree was passed in terms of an award. The property was sold in execution of the decree subject to the first mortgage and was purchased by *H* with the permission of the Court. In 1908 the decree-holder applied to execute the decree of 1896. *H* was made a party to the execution proceedings. It was contended by *H* that he was not bound by the decree under execution and was entitled to have the mortgage amount determined again in the execution proceedings. The decree-holder urged that *H's* mortgage had been extinguished by his purchase at the Court sale ; and as such purchaser he was bound by the decree by which the original mortgagors were bound at the date of the auction-sale ; and that *H* did nothing to show that he intended to keep alive his mortgage. *Held*, that as a second mortgagee *H* was entitled to redeem the first mortgage ; and to have the amount of the first mortgage determined again as between himself and the first mortgagee. *Held*, further, that as auction-purchaser *H* became entitled to all the rights which the mortgagors and the mortgagee had at the date of the sale, *i.e.*, to all the rights of the mortgagors as they existed at the date of the mortgage upon which the decree was based. *Held*, also, that *H* must be presumed to have intended to keep his mortgage alive, as it was clearly for his benefit to do so. SHANKAR VENKATESH *v.* SADASHIV MAHADJI (1913) . . . **I. L. R. 38 Bom. 24**

5. ——— *Suit for redemption — Valuation — Jurisdiction — Malabar law— Mortgage by karnavan, whether a junior member is bound to sue to set aside.* The proper valuation of a suit to redeem a mortgage is the amount of the mortgage admitted by the plaintiff to be binding on him, and not that of the mortgages set up by the defendant. In such a suit the question of jurisdiction has to be decided in the averments on the plaint, and not with reference to the pleas of the defendant. *Chandu* v. *Kombi, I. L. R. 9 Mad. 208*, followed. *Unni* v. *Kunchi Amma, I. L. R. 14 Mad. 26, 28*, referred to. When a karnavan of a Malabar tarwad makes an alienation which is not binding on the other members, the latter need not sue to set it aside, but can recover possession on the strength of their title, in the absence of proof of the validity of the alienation. *Secus :* where the plaintiff has himself executed the instrument under which the defendant claims. The trustee of a Malabar *devasom* first executed an *otti* for Rs. 50, and subsequently renewed the same in a consolidated *otti* for Rs. 1,650 and further created a *purankadam* for Rs. 1,500, on the same property. His successor sued to redeem the *otti* for Rs. 50, treating the other mortgages as invalid. *Held*, that the suit as framed was maintainable, and the plaintiff was not bound to sue to set aside the later mortgages credited by his predecessor. CHAPPAN *v.* RARU (1912) **I. L. R. 37 Mad. 420**

MORTGAGE—*concld.*

5. REDEMPTION—*concld.*

MORTGAGE BY CONDITIONAL SALE.

——— *Foreclosure—Sale by mortgagee after foreclosure—Rights of purchaser— Suit for sale by puisne mortgagees—Limitation Act (IX of 1908), Sch. I, Art. 134—Limitation.* A mortgagee under a mortgage by conditional sale foreclosed, and after foreclosure sold the mortgaged property as unincumbered. Subsequently to this certain puisne mortgagees, who had not been made parties to the foreclosure proceedings, brought a suit for sale on their mortgage. *Held*, (i) that the purchasers could not hold up as a shield the mortgage by conditional sale of their vendor, for that had become extinct on foreclosure ; and (ii) that article 134 of the first schedule to the Limitation Act, 1908, had no application to the suit. MUNNA LAL *v.* MUNUN LAL (1914) **I. L. R. 36 All. 327**

MORTGAGE BY KARNAVAN.

See MORTGAGE **I. L. R. 37 Mad. 420**

MORTGAGE DECREE.

See APPEAL . **I. L. R. 41 Calc. 418**

MORTGAGEE.

See TRANSFER OF PROPERTY ACT (IV OF 1882), S. 101. **I. L. R. 38 Bom. 369**

——— **title of—**

See REGISTRATION. **I. L. R. 41 Calc. 972**

MORTGAGOR AND MORTGAGEE.

See ADVERSE POSSESSION. **I. L. R. 37 Mad. 545**

MOTHER.

——— **removal by—**

See KIDNAPPING **I. L. R. 41 Calc. 714**

MOTOR CARS.

See NEGLIGENCE **I. L. R. 38 Bom. 552**

——— **liability of owner of—**

See LICENSEE . **I. L. R. 38 Bom. 552**

MOVABLE PROPERTY.

——— **transfer of—**

See DECREE, ASSIGNMENT OF. **I. L. R. 37 Mad. 227**

MUKHTIAR.

See LIMITATION ACT, 1908, S. 7 ; SCH. I, ART. 44 . **I. L. R. 38 Bom. 94**

MULTIFARIOUSNESS.

See CIVIL PROCEDURE CODE (1908), O. I, R. 3 . . **I. L. R. 36 All. 406**

MUNICIPAL BOARD.

See CRIMINAL PROCEDURE CODE, S. 528. **I. L. R. 36 All. 513**

See UNITED PROVINCES MUNICIPALITIES ACT (I OF 1900), SS. 87, 152. **I. L. R. 36 All. 329**

See UNITED PROVINCES MUNICIPALITIES ACT (I OF 1900), S. 147. **I. L. R. 36 All. 185**

See UNITED PROVINCES MUNICIPALITIES ACT (I OF 1900) SS. 147, 152. **I. L. R. 36 All. 227**

MUNICIPALITY.

See BOMBAY DISTRICT MUNICIPAL ACT (BOM. III OF 1901), SS. 92, 96. **I. L. R. 38 Bom. 597**

See BOMBAY DISTRICT MUNICIPAL ACT (BOM. III OF 1901), SS. 113, 122. **I. L. R. 38 Bom. 1**

See BOMBAY MUNICIPAL ACT (BOM. III OF 1888), SS. 289, 293. **I. L. R. 38 Bom. 565**

——— *Assessment, principle of*—"*Circumstances,*" *meaning of—Onus of proving value of* '*circumstances and property*'*—Bengal Municipal Act* (*Beng. III of 1884*), *ss. 85, 116—Evidence Act* (*I of 1872*), *s. 106.* The word "circumstances" in s. 85 of the Bengal Municipal Act is equivalent to *means.* Assessment, according to that section, must be made according to the means and property within the municipality. The burden of proving the value of "the circumstances and property within the municipality" is on the municipality. *Chairman of the Giridih Municipality* v. *Srish Chandra Mozumdar, I. L. R. 35 Calc. 859,* referred to. DEB NARAIN DUTT *v.* CHAIRMAN, BARUIPORE MUNICIPALITY (1913) **I. L. R. 41 Calc. 168**

MURDER.

See AUTREFOIS ACQUIT. **I. L. R. 41 Calc. 1072**

N

NAVIGABLE RIVER.

See FISHERY RIGHTS. **L. R. 41 I. A. 221**

NEGLIGENCE.

See CARRIERS . **I. L. R. 41 Calc. 80**

——— **of municipality—**

See IRRIGATION ACT, 1879. **I. L. R. 38 Bom. 116**

——— ——— ——— *Driving motor-car at excessive speed—Injury to bare licensee being driven in car—Liability of car-owner—Quantum of damages.* The defendant was driving a party of relatives and friends (including the plaintiff) in his motor-car from Deolali to Igatpuri. The road at one point turned somewhat abruptly to the left and crossed the lines of the Great Indian Peninsula Railway by means of a level crossing; after the level crossing the road turned abruptly to the right. The defendant, who was driving his car at an excessive speed, drove over the crossing at the time that a train was there due. Though it got over the crossing safely the car failed to take the abrupt turning to the right and jumping an embankment rushed into a paddy field below. The occupants of the car, with the exception of the defendant, were thrown out with much violence and the plaintiff received such grave injuries as would render him a cripple for the rest of his life. The plaintiff sued to recover damages caused to him by the defendant's negligence. *Held,* that putting the skill and caution exigible from the defendant at the very lowest, he was grossly and culpably negligent, that he was liable in damages to the plaintiff, and that in assessing damages the same principles should be applied whether the person who had incurred the liability was a private individual or a wealthy company. SORABJI HORMUSJI *v.* JAMSHEDJI MERWANJI (1914) **I. L. R. 38 Bom. 552**

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881).

——— **s. 48**—*Promissory note, making over of, without endorsement, if constitutes valid transfer of gift—Chose in action, transfer of—Negotiable Instruments Act, scope of—Transfer of Property Act* (*IV of 1882*), *ss. 123, 130, 137.* The defendant executed a promissory note in favour of one *N* who handed over this note without any endorsement to an idol through its *pujari,* and having done so died. The plaintiff, the *shebait* of the idol, thereupon sued the petitioner for the amount due on the note. *Held,* that although a promissory note to order may be transferred otherwise than by endorsement and delivery as contemplated by s. 48 of the Negotiable Instruments Act, there was no legal transfer of the promissory note to the plaintiff or the Deity whom the plaintiff represented, either as a negotiable instrument or as a chose in action under s. 130 of the Transfer of Property Act nor was there a valid gift of the promissory note under s. 123 of the Transfer of Property Act. That even assuming that there was a valid transfer, the plaintiff was not entitled to sue in his own name. It may be generally true that a valid assignment of a negotiable instrument as an actionable claim gives the assignee the rights of the holder subject to equities, but this broad proposition must be subject at any rate to the qualification that it is true only so far as it is not inconsistent with the special provisions of the Negotiable Instruments Act. *Per* RICHARDSON, J. The object and purpose of the Negotiable Instruments Act is to legalise a system under which claims arising upon certain instruments of a mercantile character

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881)—*concld.*

———— **s. 48**—*concld.*

can be treated like ordinary goods which pass by delivery from hand to hand. But except within the prescribed limits such claims cannot be so treated. AKHOY KUMAR PAL *v.* HARIDAS BYSACK (1913) . . . . **18 C. W. N. 494**

———— **s. 80**—*Promissory note, silent about interest, oral agreement as to, if prevable—Evidence Act (I of 1872), s. 92 (2).* Where there was no mention of interest in a promissory note and it was sought by the plaintiff to prove that by a contemporaneous oral agreement it was settled between the plaintiff and the defendant that interest would run at the rate of 5 per cent. per mensem: *Held*, that under s. 92 (2) of the Indian Evidence Act, the plaintiff was not entitled to prove any such oral agreement as to the rate of interest. Where the defendant admitted in his written statement that he had verbally agreed to pay interest on the promissory note at the rate of 12 per cent. per annum, s. 80 of the Negotiable Instruments Act (XXVI of 1881) was no bar to the interest being decreed at that rate. LACHMI CHAND JHAWAR *v.* HEMENDRA PROSAD GHOSH (1914) . . . . **18 C. W. N. 1260**

NEW CHANNEL.

See FISHERY RIGHTS.
L. R. 41 I. A. 221

NIMAK-SAYAR MEHAL.

———— *Saltpetre, separate right in respect of—Rights and duties of proprietor of nimak-sayar mehal.* Where the zemindari in a village was settled with a person at the Permanent Settlement and the *nimak-sayer mehal, i.e.*, the right to collect saltpetre from the same village, with another at the same settlement: *Held*, that the proprietor of the *nimak-sayar mehal* is entitled to enter on the land comprised in the village and exercise thereon, in a reasonable manner and without prejudice to the zemindari interest, all rights vested in him under the grant. *Government of Bengal* v. *Nawab Jafar Hossein Khan, 5 Moo. I. A. 467*, distinguished. *Goorooprashad Bose* v. *Bisnoochurn Heyra, 1 Mac. Sel. Rep. 451; I. D. 6 (O. S.) 331, Byjnauth Mujoomdar* v. *Deen Dyal Gooput, 2 Mac. Sel. Rep. 133; I. D. 6 (O. S.) 460*, and *King's Prerogative in Saltpetre, 12 Coke 12*, followed. GOLAB CHAND *v.* JANKI KOER (1913)
I. L. R. 41 Calc. 286

NOABAD MEHAL.

See LAND ACQUISITION ACT, 1894.
18 C. W. N. 531

NON-FEASANCE.

See IRRIGATION ACT, 1879.
I. L. R. 38 Bom. 116

NON-OCCUPANCY RIGHT.

———— *Heritability—Bengal Tenancy Act (VIII of 1885), ss. 5, cl. (2), 20, cl. (3),*

NON-OCCUPANCY RIGHT—*concld.*

44, 82. The holding of a non-occupancy *raiyat* is heritable. *Karim Chowkidar* v. *Sundar Bewa, I. L. R. 24 Calc. 207*, overruled. *Lakhan Narain Das* v. *Jainath Panday, I. L. R. 34 Calc. 516*, referred to. MIDNAPORE ZEMINDARY COMPANY, LD., *v.* HRISHIKESH GHOSH (1912)
I. L. R. 41 Calc. 1108

NORTH-WESTERN PROVINCES ACT.

See UNITED PROVINCES AND OUDH ACT.

NOTICE OF ARRIVAL.

See CARRIERS . **I. L. R. 41 Calc. 703**

NOTICE OF LEASE.

See MALICIOUS PROSECUTION.
I. L. R. 37 Mad. 181

See UNITED PROVINCES MUNICIPALITIES ACT (I OF 1890), SS. 147, 152.
I. L. R. 36 All. 185, 227

———— *Notice of lease, if notice of terms of lease.* A party having notice of a lease must be taken to have notice of the terms of the lease. SARAT CHANDRA MUKHOPADHYAY *v.* RAJENDRA LAL MITRA (1913) . **18 C. W. N. 420**

NOTICE OF SUIT.

See UNITED PROVINCES COURT OF WARDS ACT (III OF 1899), S. 48.
I. L. R. 36 All. 331

NOTIFICATION.

See FORFEITURE **I. L. R. 41 Calc. 466**

———— **publication of—**

See REVENUE SALE.
I. L. R. 41 Calc. 276

NOTIFIED AREA.

See REGISTRATION ACT (XVI OF 1908), SS. 17, 90 . **I. L. R. 36 All. 176**

NUISANCE.

See EASEMENT . **I. L. R. 41 I. A. 180**

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OATHS ACT (X OF 1873).

———— **ss. 5, 6, 13—**

See APPEAL . **I. L. R. 41 Calc. 406**

OCCUPANCY HOLDING.

See AGRA TENANCY ACT (II OF 1901), SS. 95, 167 . . **I. L. R. 36 All. 48**

See CIVIL PROCEDURE CODE, O. XX, R. 18.
I. L. R. 36 All. 461

1. ———— *Not transferable by custom—Transfer without landlord's consent, effect of—Purchaser of portion, if may recover from landlord who has dispossessed him—If he may apply to set aside sale of holding—Civil Procedure Code (Act*

OCCUPANCY HOLDING—*concld.*

XIV of 1882), s. 244—"Representative"—Holding, if may be transferred apart from occupancy right. Apart from custom or local usage, the transfer for value of the whole or a part of an occupancy holding is operative as against the raiyat, (*a*) where it is made voluntarily; (*b*) where it is made involuntarily, and the raiyat with knowledge fails or omits to have the sale set side. A sale is made involuntarily where it is in execution of a money-decree, but not of a decree founded on a mortgage or charge voluntarily made. The transfer is operative as against the landlord in all cases in which it is operative against the raiyat, provided the landlord has given his previous or subsequent consent. Where the transfer is the sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding, but where the transfer is of a part only of the holding or not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been (i) an abandonment within the meaning of s. 87 of the Bengal Tenancy Act, or (ii) a relinquishment of the holding; or (*c*) a repudiation of the tenancy. Whether there has been a relinquishment or repudiation or not, depends on the substantial effect of what has been done in each case. The transfer of the whole or a part is operative as against all other persons where it is operative against the raiyat. A person who, without the landlord's consent, purchases a portion of an occupancy holding which is not transferable by local custom or usage, is a person whose immoveable property has been sold and is a representative of the judgment-debtor under s. 244 of the Civil Procedure Code of 1882. A transferee of a portion of an occupancy holding not transferable by custom, can by suit recover possession from the landlord who has forcibly dispossessed him. A right of occupancy not transferable by custom or local usage can be transferred, but not the holding apart from the right of occupancy. DAYAMAYI *v.* ANANDA MOHAN ROY CHAUDHURI (1914) **18 C. W. N. 971**

2. ——— *Non-transferable, if may be disposed of by will—Title by estoppel—Heir-of-law of testator, if estopped—Statute, construction of—Right, if may be taken to have been conferred by implication—Bengal Tenancy Act (VIII of 1885), ss. 26, 178 (3) (d).* Except under a local usage a raiyat is not competent to make a testamentary disposition of a non-transferable occupancy holding. The heir-at-law of the raiyat is not estopped from questioning the validity of the devise. Rights cannot be conferred by mere implication from the language used in a statute. There must be clear and unequivocal enactment. *Haridas* v. *Udoy Charan, 12 C. W. N. 1086: s. c. 8 C. L. J. 261,* dissented from. AMULYA RATAN SIRCAR *v.* TARINI NATH DEY (1914) . **18 C. W. N. 1290**

OCTROI DUTY.

——— suit for refund of—

See LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 2, 62, 120 **I. L. R. 36 All. 555**

OFFERINGS.

See SEBAIT . . **L. R. 41 I. A. 267**

OFFICIAL ASSIGNEE.

——— title of—

See INSOLVENCY . **L. R. 41 I. A. 251**

ONUS OF PROOF.

See CONSIGNMENT, LOSS OF. **I. L. R. 41 Calc. 576**

See BURDEN OF PROOF.

See FORFEITURE **I. L. R. 41 Calc. 466**

See FRAUD . **I. L. R. 41 Calc. 990**

ORAL ARRANGEMENT.

See TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 54, 118. **I. L. R. 37 Mad. 423**

ORAL EVIDENCE.

See RENT . . **I. L. R. 41 Calc. 347**

ORIGINAL SIDE, HIGH COURT.

See CONTEMPT OF COURT. **I. L. R. 41 Calc. 173**

ORPHAN ADOPTION.

See HINDU LAW—ADOPTION. **I. L. R. 37 Mad. 529**

OWNER.

——— liability of—

See BUSTEE LAND. **I. L. R. 41 Calc. 164**

P

PAKKI ADAT TRANSACTIONS.

——— *Incidents of—Wagering, defence of.* From about the end of June 1908 the defendant, a young man, without much experience of business, entered into *pakki adat* transactions for the sale of linseed with the plaintiffs, who were a firm of Marwari shroffs and merchants, in a large way of business dealing as merchants and commission agents, largely in cotton and to a small extent in linseed. There was one transaction in cotton between the parties and the defendant entered into transactions in linseed to the extent of 4,000 tons in all with the plaintiffs, which transactions the plaintiffs passed on to various purchasers, 39 in all, between which purchasers and the defendant there was no privity whatever. In the contract made by the plaintiffs with each of the said purchasers there was a term that delivery should not be given to the firm of Narrondas Rajaram & Co., a Marwari firm, who were in the habit of insisting on delivery and of refusing to settle contracts by the payment or receipt of differences. The plaintiffs subsequently attempted to secure evidence to show that the transactions between themselves and the defendant were genuine transactions and not

PAKKI ADAT TRANSACTIONS—*concld.*

wagers. They endeavoured to induce the defendant to sign a draft letter prepared by the plaintiff's attorneys in which instructions were given for the purchase of a small part of the 4,000 tons of linseed for the sale of which the defendant had entered into transactions with the plaintiffs and ultimately induced the defendant to sign a draft letter acknowledging the correctness of the statements made in a letter of the plaintiffs' attorneys to the defendant setting out the plaintiffs' version of the transactions between the parties. The plaintiffs further purchased and delivered 300 tons of linseed in part-fulfilment of their contracts with the 39 purchasers, and as to the balance of 3,700 tons the contracts with these purchasers were settled by the payment of differences. It appeared, however, that the purchase of 300 tons had been effected by the plaintiffs with the view to influence the result of litigation. *Held*, that in view of the fact that the *pakka adatia* was not a disinterested broker but a party to the contract whose intention to gamble or otherwise might well be known at the inceptior of the contract, and that there was no privity between the defendant and the 39 buyers from the plaintiffs, the existence of such purchasers was only relevant as affording an indication of the plaintiffs' intention at the time of the contracts with the defendant, but in view of the condition that delivery should not be given to Narrondas Rajaram & Co., it appeared that it was not intended that delivery should be given to the 39 purchasers by the plaintiffs and accordingly the said 39 contracts were not a sufficient indication of an intention on the part of the plaintiffs to call for delivery from the defendant. *Held*, further, that on an examination of the business of the contracting parties and of the surrounding circumstances of the case it appeared that the common intention of the parties was that the plaintiffs and the defendant should deal in differences and settle that way and that accordingly the suit must fail. *Bhagwandas* v. *Kanji, I. L. R. 30 Bom. 205*, discussed. BURJORJI RUTTONJI *v.* BHAGWANDAS PARASHRAM (1913)

I. L. R. 38 Bom. 204

PARDANASHIN LADY.

1. ——— *Execution of deed —Suit for cancellation of deed—Nature of proof required—Independent advice not absolutely necessary—Lady of strong will and in the habit of managing her affairs with considerable capacity for business—Undue influence—Natural affection.* In the case of a deed executed by a *pardanashin* lady the law protects her by demanding that the burden of proof shall in such case rest not with those who attack, but with those who rely upon, the deed; and it must be proved affirmatively and conclusively that the deed was not only executed by, but was explained to, and really understood by, the grantor. It must also be established that it was not signed under duress, but by the free and independent exercise of her will. *Sajjad Husain* v. *Wazir Khan, I. L. R. 34 All. 445; L. R. 39 I. A. 156*, followed. There is no absolute rule that a deed executed by

PARDANASHIN LADY—*contd.*

a *pardanashin* lady cannot stand unless it is proved that she had independent advice. The possession of absence of independent advice is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended, and deliberately and of her own free will carried out, the transaction; and if, upon such a review of the facts—which include the nature of the thing done, and the training and habit of mind of the grantor, as well as the proximate circumstances affecting the execution—the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to stand. In a suit for cancellation of gift executed by a *pardanashin* lady the facts were that her husband had died long before, and her property (consisting of shares in a large number of villages) was managed by the mukhtar with whom she had formed an intimacy, the result of which was the birth of two illegitimate daughters, one of whom was alive at the date of the deed. The donee was the legitimate son of her mukhtar. The deed was found to be duly executed, attested by just the persons who would naturallly be called upon for such a purpose, and registered in the usual way by the proper officers. The property given was about one half of her estate, and there was no question of her being impoverished by giving it. No undue influence was affirmatively proved. It appeared in evidence that the lady was strong minded and had been in the habit for many years of managing her affairs, of entering up her accounts and of attending to business matters. *Held* (reversing the decision of the Court of the Judicial Commissioner), that the evidence as to her strength of will and business capacity, and the fact that the deed was not, in the circumstances of her life, in any way an unnatural disposition of her property, went far, taken together with the other evidence in the case, to make it conclusive that the deed was granted by her as the expression of her deliberate mind and apart from any undue influence exerted upon it; and that had independent advice been obtained the lady would have acted just as she did. *Mahomed Bakhsh Khan* v. *Hosseini Bibi, I. L. R. 15 Calc. 684; L. R. 15 I. A. 81*, referred to. KALI BAKHSH SINGH *v.* RAM GOPAL SINGH (1913) . . . . **I. L. R. 36 All. 81**

2. ——— *Executing mortgage for husband's benefit—Proof of intelligent execution—Explanation—Independent advice—Undue influence—Indian Contract Act (IX of 1872), s. 16.* Where a *pardanashin* lady was induced by her husband to give a mortgage by way of security at a time when she was living with her husband and the evidence was that the document was read and explained to her by the husband in the presence of the mortgagee: *Held*, that the Court would not be justified in holding that the mortgage was fairly taken or that the lady executing it was a free agent duly informed of what she was about; and the mortgagee must be taken to have been aware of

PARDANASHIN LADY—*concld.*

the influences under which the lady came to execute the document. *Held* (without expressing any opinion as to whether s. 16 of the Contract Act requires the undue influence to proceed from a party to the suit), that the undue influence which may affect a *pardanashin* lady's understanding of a document may proceed from a third party. *Gireesh Ch. Lahorey* v. *Bhugobutty Debia, 13 Moo. I. A. 419, Bank of Montreal* v. *Stuart,* [1911] *A. C. 120, In re Coomber,* [*1911*] *1 Ch. 723, 730, Kanhaya Lal* v. *The National Bank of India, Ld., 17 C. W. N. 541,* referred to. BADIATANNESSA BIBEE *v.* AMBIKA CHARAN GHOSH (1914). . **18 C. W. N. 1133**

PARSI MARRIAGE AND DIVORCE ACT (XV OF 1865).

——— s. 31—

See PARSIS . **I. L. R. 38 Bom. 615**

PARSIS.

——— *Maintenance—The Parsi Marriage and Divorce Act (XV of 1865), s. 31—Suit by a Parsi wife for permanent maintenance without claim for judicial separation—The High Court on its Original Side has no jurisdiction in such suit to pass an order for maintenance.* The Bombay High Court on its Original Side has no jurisdiction in a suit between a Parsi husband and a Parsi wife to make an order for permanent alimony whether accompanied or not by any order for judicial separation. The only way in which a Parsi wife is entitled to get a decree for permanent alimony is to file a petition in the Parsi Matrimonial Court and there establish facts coming within s. 31 of the Parsi Marriage and Divorce Act. GOOLBAI *v.* BEHRAMSHA (1914) . . **I. L. R. 38 Bom. 615**

PART-HEARD SUIT.

See EX PARTE DECREE.
I. L. R. 41 Calc. 956

PARTIES.

See CIVIL PROCEDURE CODE (1908), O. I, R. 3 . . . **I. L. R. 36 All. 406**

See HINDU LAW—JOINT FAMILY.
I. L. R. 36 All. 383

See MORTGAGE . **I. L. R. 41 Calc. 727**

——— right of—

See SECURITY FOR GOOD BEHAVIOUR.
I. L. R. 41 Calc. 806

PARTITION.

See ADMINISTRATOR PENDENTE LITE.
I. L. R. 41 Calc. 771

See BABUANA AND SOHAG GRANTS.
L. R. 41 I. A. 275

See CIVIL PROCEDURE CODE (1908), SS. 96, 97 . **I. L. R. 36 All. 532**

See CIVIL PROCEDURE CODE, O. XX, R. 18.
I. L. R. 36 All. 461

See HINDU LAW—ADOPTION.
I. L. R. 37 Mad. 529

PARTITION—*concld.*

See HINDU LAW—PARTITION.

See MAHOMEDAN LAW—GIFT.
I. L. R. 36 All. 333

See STAMP ACT (II OF 1899) S. 2(*15*), SCH. I, ART. 45. (*c*).
I. L. R. 36 All. 137

——— payment by—

See LIMITATION ACT (IX OF 1908), SS. 19, 20 . . . **I. L. R. 37 Mad. 146**

PARTNERSHIP.

——— *Suit for accounts of—Necessary parties—Representative of deceased partner, addition of one after period of limitation—Whole suit, if barred—Limitation Act (IX of 1908), s. 22. Art. 106.* The plaintiff brought a suit for the accounts of a partnership making parties thereto his other partners and one only of the two sons of a deceased partner who died after the partnership business came to an end but before the suit was instituted. On the objection being taken, the other son of the deceased partner was brought on the record after the expiration of the period of limitation: *Held,* that inasmuch as all the partners or their representatives were necessary parties and inasmuch as under s. 22 of the Limitation Act the suit must, as regards the added defendant, be deemed to have been instituted when he was made a party the whole suit was barred by limitation. That in a partnership suit the partners must be made parties or the suit will fail. AMBIKA CHARAN GUHA *v.* TARINI CHARAN CHANDA (1913)
18 C. W. N. 464

PARTNERSHIP ACCOUNTS.

——— *Duty of each partner to discover all documents—Arbitration, reference of dispute with customer to, by one partner—Others, if bound—Question if one of law—Agreement to refer not originally binding, becoming binding by acquiescence or acceptance of benefit—Question, if should be allowed to be taken for the first time on appeal—Partner charged with entering into agreement to refer negligently and improperly—Measure of damages—Onus of proof.* For the purpose of working out a partnership decree, each party to the action is bound to produce and discover all documents in his possession relating to the partnership, and an application by the plaintiff for discovery of documents in the possession of a defendant in such an action ought not to have been refused: *Held,* that the decision of the High Court in so far as it was of opinion that the accounts taken by the Commissioner (and affirmed by the trying Court) were not properly taken or supported by evidence and must be investigated afresh, was correct. A sum of money, paid by a customer as the result of a reference to arbitration in which the legal personal representatives of a deceased partner were no parties, having been brought into the partnership accounts, the latter who did not dispute the item in the first Court for the first time on appeal contended that not being parties to the reference the

PARTNERSHIP ACCOUNTS—*concld.*

were not bound by it: *Held*, that the question whether the legal personal representatives of the deceased partner were bound by the agreement to refer and by the award was not a simple question of law to be decided without reference to the facts of the case or any evidence which might have been available if it had been raised at the proper time, and the contention should have been rejected as having been put forward at too late a stage. An agreement to refer not originally binding might become binding later on by the acquiescence of the party or his acceptance of benefits thereunder. *Held*, further, that if the legal personal representatives of the deceased partner were not bound by the award, they would not be entitled to relief on the footing that it was binding, but had been negligibly and improperly entered into. That if relief could be given on this footing, the difference between the amount originally claimed against the customer and the amount paid by him under the award would not necessarily be the measure of damages; nor could the onus of proving that it was any less sum be thrown on the person accused of negligent and improper conduct. *Haji Mahamad Akbar* v. *Dwarka Nath Sarkar, 14 C. W. N. 1106*, reversed in part. DWARKA NATH SARKAR *v.* HAJI MAHOMED AKBAR (1914) . **18 C. W. N. 1025**

PASTURAGE.

——— *Right of, suit for declaration of, and for injunction—Mere thirty years' uninterrupted user, if enough—Presumption of right.* In a suit for declaration that the plaintiffs who were cultivating tenants had a right of pasturage over certain lands and for an injunction on the landlord to remove fences, etc., therefrom, the finding of the lower Appellate Court in decreeing the suit was: "The land has been lying unoccupied from time immemorial and the villagers have been grazing their cattle here for more than 30 years. Their user was open and peaceful, without interruption and should be, in the circumstances of this case, presumed to be as of right also": *Held*, that this finding was not sufficient to establish the plaintiffs' right of pasturage over the land in suit. It being a customary right, it must be reasonable, and it would be unreasonable to hold that no land over which cattle had grazed should ever be brought under the plough. SYED ALI *v.* SARJAN ALI (1913) **18 C. W. N. 735**

PATNI.

See PUTNI.

PATTA.

——— **tender of—**

See MADRAS ESTATES LAND ACT (I OF 1908) . . **I. L. R. 37 Mad. 540**

PENAL ASSESSMENT.

——— ——— *Right of Government to levy—Interference with possession—Possession short of the statutory period is sufficient basis for a suit for a declaration of title—Specific Relief Act (I of 1877), s. 42. Per* CURIAM: The Government has no right to collect penal assessment from a person in possession of land simply on the ground that he is not the legal owner of the land, but such right is conditional on the land being communal. *Per* ABDUR RAHIM, *J.* (ALYING, *J. dubitante*).—A person in possession of land even though for less than 12 years, would, under s. 42 of the Specific Relief Act, be entitled to a declaration that he is in lawful possession as against a wrong-doer who interferes with his possession. *Ismail Arif* v. *Mahomed Ghous, I. L. R. 20 Calc. 834*, applied. *Hanmantarav* v. *Secretary of State for India, I. L. R. 25 Bom. 287*, distinguished. *Rassonada Rayar* v. *Sitharama, Pillai, 2 Mad. H. C. 171*, referred to. The levying of penal assessment on land if not justified amounts to unlawful interference with possession. AYYAPARAJU *v.* SECRETARY OF STATE (1912) **I. L. R. 37 Mad. 298**

PENAL CODE (ACT XLV OF 1860).

See CONTEMPT OF COURT. **I. L. R. 41 Calc. 173**

——— **ss. 34, 109, 114—**

See AUTREFOIS ACQUIT. **I. L. R. 41 Calc. 1072**

——— **ss. 52, 191, 193**—*Perjury—Verification of application for execution containing statements in fact untrue—"Good faith."* A man cannot be convicted of perjury under s. 193 of the Indian Penal Code for having acted rashly, or for having failed to make reasonable inquiry with regard to the facts alleged by him to be true. It must be found that he made some statement which he knew to be false, or which he believed to be false, or which he did not believe to be true, and this finding should be arrived at independently of the definition of "good faith" in s. 52 of the Code. EMPEROR *v.* MUHAMMAD ISHAQ (1914) . . **I. L. R. 36 All. 362**

——— **s. 62**—*Sentence—Forfeiture of property—Offences in respect of which forfeiture is a suitable penalty. Held*, that s. 62 of the Indian Penal Code which empowers a Court to order in certain cases the property of a convicted person to be forfeited to the Crown, should ordinarily be applied in cases of crimes against the State or affecting the safety of the public generally. EMPEROR *v.* GAYA PRASAD (1914) **I. L. R. 36 All. 395**

——— **ss. 99, 147**—*Right of private defence—Rioting—Trespass—Wrongful possession for 14 hours—Repelling trespass by force if any offence.* Where the opposite party erected some huts stealthily at night on a plot of land of which the petitioners were in peaceful possession and it was alleged that the opposite party were in possession of the land for about 14 hours and the petitioners at break of day on coming to know of this took the earliest opportunity to exercise their own right of private defence and came to the spot armed to turn out the opposite party who were found by them still engaged in erecting more huts and there was a free fight between the parties and the petitioners

PENAL CODE (ACT XLV OF 1860)—*contd.*

ss. 99, 147—*concld.*

did not inflict more hurt than was necessary for defending themselves: *Held*, that the petitioners were not guilty of rioting and that in the circumstances of the case the petitioners had no time to have recourse to the public authorities and they were entitled to their right of private defence. CHANDULLA SHEIKH *v.* THE KING-EMPEROR (1912) **18 C. W. N. 275**

ss. 99, 353—*Assault—Public servant acting under colour of office and in good faith—Right of private defence.* Where the petitioner was convicted under s. 353 of the Penal Code, of having assaulted a Civil Court peon when executing a writ of delivery of possession of a share in a tank by ordering some fishermen to cast their nets in the tank and catch fish for the decree-holder as provided in the writ: *Held*, that whatever mistake there might be in the procedure of the Munsif in giving the direction in the writ, the petitioner had no right of private defence under s. 99 of the Penal Code, against the peon who was a public servant acting under colour of his office and in good faith. PREO LAL MUKHERJI *v.* THE KING-EMPEROR (1913) . . . . . **18 C. W. N. 548**

ss. 143, 146, 447—*Unlawful assembly and criminal trespass—Bonâ fide belief in the existence of right to land and assertion of such right.* In consequence of a dispute between two landlords, the disputed property was attached under s. 146, Criminal Procedure Code, in a proceeding under s. 145, Criminal Procedure Code, and a Receiver appointed, but the Magistrate appointing the Receiver omitted to give any direction as regards the management of the property. There was a dispute berween the tenants on both sides as regards the grazing rights over the property, but it appeared that the zemindar of the petitioners gave them the grazing rights over the land and they objected to a tenant of the rival zemindar ploughing up a portion of the land over which they alleged they had grazing rights under colour of a lease from the Receiver. The petitioners were convicted under ss. 143, 447 of the Penal Code. *Held*, that the petitioners could not be convicted of criminal trespass when they were asserting a right which had never been declared against them, which they *bonâ fide* believed they had, and for the same reason they could not be said to have formed an unlawful assembly because they went and protested against the land being ploughed up. REAJUDDIN MOLLA *v.* KING-EMPEROR (1914) . . . **18 C. W. N. 1245**

ss. 147, 325 and 149—

See RIOTING . **I. L. R. 41 Calc. 43**

ss. 147, 353—

See RIOTING . **I. L. R. 41 Calc. 836**

ss. 147, 447—*Rioting—Criminal trespass—Charge of rioting with common object of taking forcible possession of complainant's land and assaulting him—Absence of charge under s. 447 of the Penal Code—Conviction of criminal trespass, propriety of—Criminal Procedure Code (Act V of 1898), s. 238.* When the petitioners who were charged under s. 147 of the Penal Code, with rioting with the common object of taking forcible possession of complainant's land and of assaulting him and others were convicted of criminal trespass under s. 447 of the Penal Code, without any charge being framed against them or without being called upon to plead to a case of trespass: *Held*, that the conviction was illegal. If the common object had been to commit criminal trespass, the conviction under s. 447 of the Penal Code, without a charge having been framed against the accused might have been legally valid, but the common object stated in the charge did not make out a case of trespass. In a case of trespass, before a conviction is obtained, the prosecution must establish on the part of the trespasser an intention to commit an offence or to intimidate, insult, or annoy any person in possession of the property on which trespass has been committed. *Queen* v. *Salamut Ali, 23 W. R. Cr.* 59, referred to. ARIFF MUNSHI *v.* EMPEROR (1913) **18 C. W. N. 992**

ss. 148, 149, 304, 326—

See CRIMINAL TRESPASS.

I. L. R. 41 Calc. 662

s. 153-A—

See FORFEITURE . **I. L. R. 41 Calc. 466**

ss. 182, 211—*Sanction to prosecute—Jurisdiction—Application by insolvent to District Judge alleging misappropriation of property of insolvent.* A person who had been declared an insolvent, and in respect of whose property a Receiver had been appointed by the District Judge, applied to the Court representing that one Bhikhi Ram had misappropriated certain property belonging to him and asking that Bhikhi Ram's house might be searched. The District Judge forwarded this application to the Magistrate, and Bhikhi Ram was arrested and his house searched. Subsequently, however, proceedings against Bhikhi Ram were dropped, there being no evidence against him. Bhikhi Ram then applied to the District Judge for sanction to prosecute the applicant under ss. 182 and 211 of the Indian Penal Code. The sanction asked for was granted. *Held*, that as regards s. 182 there was no objection to the order; but as regards s. 211 the criminal proceedings taken against Bhikhi Ram were not taken in the Court of the District Judge, and it was at any rate doubtful whether it could be said that the offence committed by the applicant was committed in relation to any proceeding pending in that Court. MUHAMMAD FAKHR-UD-DIN *v.* BHIKHI RAM (1914)

I. L. R. 36 All. 212

s. 188—

See SANCTION FOR PROSECUTION.

I. L. R. 41 Calc. 14

s. 193—*Order to prosecute—Case pending before Court of Session—Alleged perjury—Propriety of prosecution by Committing Magistrate.*

PENAL CODE ACT (XLV OF 1860)—*contd.*

s. 193—*concld.*

Where a Committing Magistrate had ordered the prosecution of a witness under s. 193 of the Penal Code, while the case in which he had deposed was pending before the Court of Sessions, the High Court set aside the order. The impropriety of taking proceedings against a witness while the case is still pending, commented on. BIRENDRA NATH DAS GUPTA *v.* THE EMPEROR (1914)

18 C. W. N. 1342

ss. 193, 196, 199, 471—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), S. 195, CLS. (*b*) AND (*c*).

I. L. R. 38 Bom. 642

s. 211—*Laying false information before police—Duty of prosecution—Onus of proof—Elements necessary to be proved—Failure of defence to examine witness, effect of.* Where the petitioner was convicted under s. 211 of the Penal Code of having laid a false information of theft before the police, and the petitioner's case was that he had heard from his wife that the persons named in the information had disappeared and the properties named therein were missing, and his information was based on this statement of the wife, and the prosecution did not prove that there was no such statement by the wife who was not examined as a witness for the prosecution nor did the petitioner examine her as a witness on his side: *Held*, that the duty of the prosecution in a case under s. 211 of the Penal Code, is to prove by satisfactory evidence that the charge was wilfully false to the knowledge of the maker of the charge. That it is for the prosecution to establish their case and if they fail to supply that proof which is required to secure the conviction of the accused, the failure on the part of the latter to examine any particular witness or witnesses will not imply the guilt of the accused. That the case against the petitioner being that no theft took place, the obligation of proving it rested on the prosecution. In the present case the prosecution not having established that there was, as a matter of fact, no theft and the petitioner knew that there was no theft, the High Court set aside the conviction and sentence under s. 211 of the Penal Code. HASSAN MIRZA *v.* MAHBUBAN (1913)

18 C. W. N. 391

ss. 224, 109—

See ARREST BY PRIVATE PERSON.

I. L. R. 41 Calc. 17

ss. 300, 325—*Murder—Grievous hurt—Hanging a human body believing the person to be dead and thereby causing death, if murder—Intention to kill.* The accused assaulted his wife and gave her kicks, blows and slaps. The kicks were given below the navel. The woman fell down and became unconscious. In order to create an appearance that the woman had committed suicide, the accused took up the unconscious body of his wife, thinking it to be a dead body, and hung it by a rope. The *post mortem* examination showed that death was due to hanging. *Held*, that the accused could not have intended to kill his wife, if he thought that she was already dead, and he could not be convicted of murder. The offence that the accused committed was an offence under s. 325 of the Penal Code, for having given her kicks, blows and slaps before she fell down. EMPEROR *v.* DALU SIRDAR (1914) . . **18 C. W. N. 1279**

PENAL CODE (ACT XLV OF 1860)—*contd.*

ss. 300, 325—*concld.*

s. 306—*Abetment of suicide—Sati. Held*, that persons actively assisting a Hindu widow in becoming a *sati* are guilty of the offence of abetment of suicide as defined in s. 306 of the Indian Penal Code. EMPEROR *v.* RAM DAYAL (1913)

I. L. R. 36 All. 26

s. 326—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), S. 307.

I. L. R. 37 Mad. 236

s. 336—*Doing an act endangering human life or the safety of others—Temple resorted to by pilgrims on festive occasions—Duty of person in charge to ensure safety of pilgrims attending by license and invitation.* The petitioner was the lessee of a certain temple from some of the *shebaits* and was the general manager of all of them. It appeared that on a certain day in the year pilgrims and others in large numbers visited this temple. Close by the gate, leading from an outer courtyard into the inner temple, there was a well which was surrounded by a masonry platform 1½ to 2 feet high and the ring or parapet of the well stood again about 1 foot above the platform. Early at night on the day of the congregation of pilgrims, an accident having occurred, the petitioner at the instance of the Police Officer in charge had a light placed on or near the one-foot parapet, but at a later hour the petitioner had the light removed and thereafter between 1 and 2 A.M., while the people were again entering into the inner temple, a boy who had no previous knowledge of the well and in the darkness could not see it fell into it: *Held*, that the facts constituted an offence within the meaning of s. 336 of the Penal Code. That on the occasion of the festival in question, the temple becomes a place of public resort, and it was the bounden duty of the petitioner as the person in charge to take all reasonable precautions necessary to ensure the safety of those crowding thither by his license and invitation. NARSING CAHRAN MAHAPATRA *v.* KING-EMPEROR (1914)

18 C. W. N. 1176

s. 353—

See CRIMINAL PROCEDURE CODE, S. 54(*1*).

I. L. R. 36 All. 6

See SEARCH BY POLICE OFFICERS.

I. L. R. 41 Calc. 261

s. 360.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SS. 423, 439.

I. L. R. 37 Mad. 119

PENAL CODE (ACT XLV OF 1860)—*contd.*

——— **s. 363**—

See KIDNAPPING. **I. L. R. 40 Calc. 714**

——— *Kidnapping from lawful guardianship—Minority of Mahomedan, when to cease for the purpose of s. 363—Majority Act (IX of 1875), s. 3.* According to Mahomedan Law the occurrence of puberty determines minority and the mother's right to custody, but for the purpose of s. 363 of the Penal Code, regard must be had only to the definition of minority in s. 3, of the Majority Act (IX of 1875). *In the matter of Khatija Bibi, 5 B. L. R. 557,* distinguished. *Re* MUTHU IBRAHI (1913) . . . . **I. L. R. 37 Mad. 567**

——— **s. 379**—

See THEFT . . **I. L. R. 41 Calc. 433**

——— **s. 380**—*Circumstantial evidence necessary for conviction, nature and character of.* The petitioner was convicted under s. 380 of the Penal Code, for theft of a number of currency notes and the findings were that he as well as five other persons entered the room at or about the time the notes were stolen, that his brother-in-law was present when two of the stolen notes were cashed in Calcutta, that shortly after the theft he was in possession of a large sum of money for which he could not satisfactorily account. *Held,* that circumstantial evidence must be exhaustive and exclude the possibility of guilt of any other person, or must point conclusively to the complicity of the accused. That in the present case the evidence did not fulfil the conditions of circumstantial proof at all. CHIRAGUDDIN *v.* EMPEROR (1914) **18 C. W. N. 1144**

——— **ss. 399, 402**—

See DACOITY . **I. L. R. 41 Calc. 350**

——— **ss. 405, 409**—

See CRIMINAL BREACH OF TRUST. **I. L. R. 41 Calc. 844**

——— **s. 423**—"*Consideration,*" *meaning of.* The word "consideration" in s. 423 of the Penal Code, cannot mean the property transferred. Therefore an untrue assertion in a transfer deed that the whole of a plot of land belonged to the transferrer, is not a statement relating to the consideration for the transfer and is not an offence under the section. MANIA GOUNDAN, *Re* (1911) **I. L. R. 37 Mad. 47**

——— **s. 447**—*Criminal trespass—One co-sharer building on common land without the consent of the other co-sharer.* Where one co-sharer built upon a piece of common land against the will of the other co-sharer, whose consent had been previously asked and had been refused, it was *held* that this circumstance alone was not sufficient to render the co-sharer so building guilty of criminal trespass. *In the matter of the petition of Gobind Prasad, I. L. R. 2 All. 465,* and *Emperor* v. *Lakshman Raghunath, I. L. R. 26 Bom. 558,* refererd to. EMPEROR *v.* RAM SARUP (1914) **I. L. R. 36 All. 474**

PENAL CODE (ACT XLV OF 1860)—*concld.*

——— **s. 463**—*Enticing away a married woman—Quantum of evidence necessary to prove the marriage.* The fact and the legality of the marriage are material elements in a case of enticing or taking away or detaining with criminal intent a married woman and must be proved as strictly as any other material facts, but it is not necessary that they should be proved in any particular way. *Queen Empress* v. *Subbarayan, I. L. R. 9 Mad. 9, Empress* v. *Pitambur Singh, I. L. R. 5 Calc. 566, Empress of India* v. *Kallu, I. L. R. 5 All. 233, Queen Empress* v. *Santok Singh, All. Weekly Notes,* (1898) 186, and *Queen-Empress* v. *Dat Singh, I. L. R. 20 All. 166,* referred to. EMPEROR *v.* NAZIR KHAN (1913) . . . **I. L. R. 36 All. 1**

——— **s. 498**—*Defamation—absolute privilege for statement in complaint to Magistrate.* A defamatory statement in a complaint to a Magistrate is absolutely privileged. MUTHUSAMI NAIDU, *Re* (1912) . . . **I. L. R. 37 Mad. 110**

——— **s. 499, Exceps. 1, 2, 9 ; s. 52**—

See PRIVY COUNCIL, PRACTICE OF. **I. L. R. 41 Calc. 1023**

——— **s. 499, Excep. 9**—

See DEFAMATION **I. L. R. 41 Calc. 514**

PENSION.

See PENSIONS ACT (XXIII OF 1871), S. 11. **I. L. R. 36 All. 318**

PENSIONS ACT (XXIII OF 1871).

——— **s. 11**—*Pension—Grant of land by Government—Construction of document—Execution of decree—Civil Procedure Code (1908), s. 60 (g).* The Government "for political considerations" granted certain property to the original grantee for life and to his descendants as an absolute estate. *Held,* that such grant did not constitute a political pension within the meaning of s. 60 (*g*) of the Code of Civil Procedure, and that the land so granted was not exempt from attachment and sale in execution of a decree. *Held,* also, that the rights of the parties to whom the grant had been made by the Government must be determined by reference to the original *sanad* conferring title on the grantee and his descendants, and the opinions expressed by certain Revenue Officers as to its meaning were irrelevant on a question of the construction of the document. *Lachmi Narain* v. *Makund Singh, I. L. R. 36 All. 617,* and *Amna Bibi* v. *Najm-un-nissa, I. L. R. 31 All. 382,* followed. KANIZ FATIMA BEGAM *v.* SAKINA BIBI (1914) **I. L. R. 36 All. 318**

PERJURY.

See PENAL CODE (ACT XLV OF 1860), SS. 52, 191, 193 **I. L. R. 36 All. 362**

——— **sanction for, not desirable in public interests**—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), S. 195 **I. L. R. 37 Mad. 564**

PERMANENT TENANT.

See BHAGDARI ACT (BOM. ACT V OF 1862) S. 3 . . **I. L. R. 38 Bom. 679**

See LAND REVENUE CODE (BOM. ACT V OF 1879), S. 83. **I. L. R. 38 Bom. 716**

PERPETUAL INJUNCTION.

See TRUST . . **I. L. R. 41 Calc. 19**

PLAINT.

See AMENDMENT OF PLAINT. **I. L. R. 36 All. 370**

— amendment of—

See PRE-EMPTION . **I. L. R. 36 All. 573**

——— order returning, for presentation to proper Court—

See CIVIL PROCEDURE CODE (1908), S. 104, O. XLIII., R. 10(*a*). **I. L. R. 36 All. 58**

——— *Leave to file, given by Registrar—Re-presentment—Limitation, error of procedure, rectification within time, delay in completion of order and recording the representment of plaint.* Where on leave being asked for in the plaint under cl. 12 of the Charter the Registrar on the Original Side of the High Court, under a misapprehension of the change in procedure with regard to the filing of plaints, gave such leave but on discovery of the fact that the Registrar had no authority to grant such leave, the plaint was withdrawn on the 15th August 1907 and was immediately after presented before a Judge sitting on the Original Side who gave the leave and endorsed on the plaint "presented 15th August 1907," but there was delay in the office in completing the order, and stamps were supplied upon requisition from the office on the 14th December 1907, and it was recorded in the office and also re-endorsed on the plaint that the plaint was re-registered and filed on the 18th December 1907; on objection being taken by the defendant that the suit was barred by limitation: *Held* (by CHAUDHURI, *J.*), that the 15th of August 1907, as recorded by the Judge on the plaint, was the date of its presentation and the suit was not barred by limitation. OSMOND BEEBY *v.* KSHITISH CHANDRA ACHARYA CHAUDHURI (1914) **18 C. W. N. 631**

PLEADER.

See DEFAMATION . **I. L. R. 41 Calc. 514**

——— engaging in trade without intimating to Court—

See LEGAL PRACTITIONERS' ACT (XVIII OF 1879), S. 13. **I. L. R. 37 Mad. 238**

PLEADER'S FEE.

——— *Practice—Costs, scale of—Taxation—Probate proceedings—Probate and Administration Act (V of 1881), s. 83—General Rules and Circular Orders of the High Court, Chapter VI, rr. 36(a) and 42(a) and Chapter X, r. 26.* In a contested probate proceeding in which letters of administration and costs are granted, the pleader's fee can only be assessed under Chapter VI, *r.* 42 (*a*) of the General Rules and Circular Orders of the High Court. Rule 36(*a*), and Chapter VI of the Rules and Orders has no application. BAIJNATH PROSAD SINGH *v.* SHAM SUNDAR KUAR (1913) **I. L. R. 41 Calc. 637**

PLEADER'S FEE—*concld.*

PLEADINGS.

See PRE-EMPTION. **I. L. R. 36 All. 456, 476, 573**

1. ——— *Facts in plaint not traversed in written statement or put in issue—Court not entitled to decide otherwise.* Where a statement of fact in the plaint was not traversed in the written statement or put in issue, the Court is not entitled to decide it against the pleadings. RAM LAL MONDAL *v.* KHIRODA MOHINI DASI (1913) **18 C. W. N. 113**

2. ——— *Variance between Plaintiff's allegation and proof, when ground for dismissal of suit—True rule—Its object—Suit for recovery of possession—Mode of ouster and time thereof, allegation as to, if material.* Where an order having been passed in favour of the defendants under s. 335 of the Civil Procedure Code of 1882, the decree-holder (now plaintiff) sued for recovery of possession upon declaration of his title, alleging that the order itself deprived him of possession, but the Courts below dismissed the suit without trial on the merits, on the ground that the order under s. 335, Criminal Procedure Code, had not that effect: *Held*, that the suit should have been tried on the merits, as the particular mode in which or the point of time at which the ouster of the plaintiff took place was not so material that a variance between pleading and proof on such matters would alone be considered a sufficient ground for dismissing the suit. The determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case made thereby. It does not follow from this that every variance between pleading and proof is material and justifies a dismissal of the claim. The rule that the allegations and the proof must correspond is intended to serve a double purpose, viz., *first*, to apprise the defendant distinctly and specifically of the case he is called upon to answer, so that he may properly make his defence and may not be taken by surprise; and, *secondly*, to preserve an accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations. NABADIPENDRA MUKERJEE *v.* MADHU SUDAN MONDAL (1912) . . . **18 C. W. N. 473**

POLICE REPORT.

See SANCTION FOR PROSECUTION. **I. L. R. 41 Calc. 14**

POLICY OF INSURANCE.

——— if creates trust—

See MARRIED WOMEN'S PROPERTY ACT (III OF 1874), S. 6. **I. L. R. 37 Mad. 483**

POOLBUNDI CHARGES.

See EMBANKMENT.
I. L. R. 41 Calc. 130

POSSESSION.

See COCAINE . **I. L. R. 41 Calc. 537**
See EJECTMENT, SUIT FOR.
I. L. R. 38 Bom. 240
See SALE . . **I. L. R. 41 Calc. 148**
See TITLE . . **I. L. R. 41 Calc. 394**

——— **by person claiming as trustee—**
See ADVERSE POSSESSION.
I. L. R. 37 Mad. 373

by servant—
See ARMS . . **I. L. R. 41 Calc. 11**

——— **suit for—**
See GHATWALI-TENURES.
I. L. R. 41 Calc. 812
See LIMITATION . **I. L. R. 41 Calc. 52**

——— *Suit for recovery of, by proprietor of undivided half share—Nature of decree plaintiff entitled to—Proprietor of undivided half share, if can eject any one on the land from the whole of it.* The plaintiff brought a suit for recovery of possession of a plot of land to the extent of an eight annas share, the plaintiff being the proprietor to the extent of eight annas and defendants Nos. 5 and 6 proprietors to the extent of the other eight annas. Defendants Nos. 1 to 3 were tenants on the land recognised by defendants Nos. 5 and 6. The plaintiff asked for joint possession with defendants Nos. 1 to 3, if joint possession with defendants Nos. 5 and 6 could not be granted: *Held*, that all that the plaintiff could ask for was joint possession of an eight annas share. He could not in this suit ask the Court to decide who was entitled to possession of the other eight annas share of the land with which he had no concern. That a person entitled to an undivided half share of the land cannot sue to eject anybody from the whole of it and the defendants Nos. 1 to 3 who had been recognised as tenants by the co-sharer landlords could not be ejected by the plaintiff from the whole of the land. That the plaintiff was entitled to a decree against all the defendants for recovery of joint possession of an eight annas share of the disputed property and he was entitled to enforce the right by a suit for partition, if he was not satisfied with the delivery of possession of an undivided half share. GAJADHAR AHIR *v.* BHIKARI LAL (1914)
18 C. W. N. 1011

POSSESSORY TITLE.

See SPECIFIC RELIEF ACT (I OF 1877), S. 9.
I. L. R. 36 All. 51

POSTPONEMENT.

See CROSS-EXAMINATION.
I. L. R. 41 Calc. 299

PRACTICE.

See CIVIL PROCEDURE CODE (1908), S. 97.
I. L. R. 38 Bom. 331
See CIVIL PROCEDURE CODE (1908), O. V, R. 5 . . **I. L. R. 38 Bom. 377**
See CIVIL PROCEDURE CODE (1908), O. XLVII, R. 1 . **I. L. R. 38 Bom. 416**
See COMPLAINT **I. L. R. 41 Calc. 1013**
See CRIMINAL PROCEDURE CODE (ACT V OF 1898), S. 349.
I. L. R. 38 Bom. 719
See CRIMINAL PROCEDURE CODE, S. 438.
I. L. R. 36 All. 378
See CROSS-EXAMINATION.
I. L. R. 41 Calc. 299
See DECREE, ASSIGNMENT OF.
I. L. R. 37 Mad. 227
See DISCOVERY . **I. L. R. 41 Calc. 6**
See DIVORCE—WIFE'S COSTS.
I. L. R. 41 Calc. 963
See EVIDENCE ACT (I OF 1872), S. 30.
I. L. R. 38 Bom. 156
See EX PARTE DECREE.
I. L. R. 41 Calc. 956
See HINDU LAW—JOINT FAMILY.
I. L. R. 37 Mad. 435
See PLEADER'S FEE.
I. L. R. 41 Calc. 637
See PRE-EMPTION.
I. L. R. 36 All. 476, 514
See PROFESSIONAL MISCONDUCT.
I. L. R. 41 Calc. 113
See SECURITY FOR GOOD BEHAVIOUR.
I. L. R. 41 Calc. 806

——— **as to mode of proof—**
See EVIDENCE ACT ACT (I OF 1872), SS. 4, 90 . **I. L. R. 37 Mad. 455**

1. ——— *Cause of action—Promissory Note—Consideration for Note—Separate Causes of Action—Ceylon Civil Procedure Code (Ordinance II of 1889), s. 34.* S. 34 of the Ceylon Civil Procedure Code, 1889, (which is in the same terms as the Indian Code of Civil Procedure, 1908, O. 2, r. 2) provides that every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, and that a plaintiff cannot afterwards sue for a part of the claim omitted from an action, or (without leave) for another remedy for the same cause of action. The respondent sued upon promissory notes, but the action failed owing to a material alteration in the notes. He afterwards sued to recover a part of the consideration for which the promissory notes had been given: *Held*, that although the claims in the two actions arose out of the same transaction, they were in respect of different causes of action, and that, consequently, the second action was not brought contrary to s. 34 of

PRACTICE—*concld.*

the Code and could be maintaned. PAYANA REENA SAMINATHAN *v.* PANA LANA PALANIAPPA (1913)
L. R. 41 I. A. 142

2. ——— *Withdrawal of suit—Material irregularity—Revision—High Court, power of —Civil Procedure Code (Act V of 1908), s. 115—High Courts Act, 1861, s. 15.* In a suit to set aside a revenue sale the evidence on both sides had been heard, the plaint amended during such evidence, the arguments of both parties completed, the case closed and the judgment reserved. The plaintiffs then applied for leave to withdraw the suit with liberty to bring a fresh suit on the same cause of action. This application was granted on the ground of formal defects. The plaintiffs, subsequently, instituted a fresh suit. Thereupon, the defendant moved the High Court to set aside the order and obtained a Rule: *Held*, that the High Court had no power to deal with this case under s. 115 of the Code of Civil Procedure. *Kharda Co., Ld.* v. *Durga Charan Chandra, 11 C. L. J. 45, Dick* v. *Dick, I. L. R. 15 All 169*, and *Tirupati* v. *Muttu, I. L. R. 11 Mad. 322*, distinguished. BANSI SINGH *v.* KISHUN LALL THAKUR (1913)
I. L. R. 41 Calc. 632

3. ——— *Admission of fresh evidence—Appellate Court—Civil Procedure Code (Act V of 1908), O. XLI, r. 27.* Where an Appellate Court desires to admit fresh papers in evidence, under r. 27 of O. XLI of the Civil Procedure Code (Act V of 1908), it must record its reasons in writing for doing so and admit them formally in evidence. DAJI BABAJI *v.* SAKHARAM KRISHNA (1914) . . **I. L. R. 38 Bom. 665**

PRACTICE AND PROCEDURE.

See PUBLIC PROSECUTOR.
I. L. R. 41 Calc. 425

PRE-EMPTION.

See MAHOMEDAN LAW—PRE-EMPTION.

——— **right of—**

See MAHOMEDAN LAW—PRE-EMPTION.
I. L. R. 38 Bom. 183

1. ——— *Wajib-ul-arz—Resale of property during pre-emption suit to person with a preferential right, but after the extinction of his right to pre-empt by reason of limitation.* During the pendency of a suit for pre-emption under the provision of the village wajib-ul-arz, the vendee resold the property in suit to a person who originally had a pre-emptive right superior to that of the plaintiff, but who at the date of the sale, was barred by limitation from enforcing it. *Held*, that the plaintiff's claim was not defeated by such sale. *Manpal* v. *Shaib Ram, I. L. R. 27 All. 544, Janki Prasad* v. *Ishar Das, I. L. R. 21 All. 374*, and *Ram Gopal* v. *Piari Lal, I. L. R. 21 All. 441*, distinguished. KAMTA PRASAD *v.* RAM JAG (1913)
I. L. R. 36 All. 60

2. ——— *Wajib-ul-arz—Custom—Effect of confiscation of part of village—*

PRE-EMPTION—*contd.*

"*Karibi wa khandani.*" In a village comprising two eight anna *thoks* a custom of pre-emption was recorded as prevailing in two wajib-ul-arzes of 1833 and 1860 and in the *zamima khewat* of 1884, the date of the last settlement. *Held*, that the custom so recorded was in no way modified by the fact that a four anna undivided share in the village had been confiscated by the Government after the mutiny and re-granted to other proprietors. *Held*, also, that a person related to a vendor through the female line only and twelve degrees removed from him could not be considered as falling within the description in the wajib-ul-arz of "*karibi wa khandani.*" DURGA PRASAD PANDE *v.* FATEH BAHADUR SINGH (1914) . **I. L. R. 36 All. 451**

3. ——— *Claim based on relationship to vendor—Death of plaintiff pending suit—Sons of plaintiff not entitled to take advantage of the relationship of their father.* The plaintiff in a suit for pre-emption had a preferential right over the vendee on the ground of his nearer relationship to the vendor, but the plaintiff's sons had not. *Held*, that the plaintiff's sons could not, on the death of their father pending the suit, claim to take advantage of the relationship in which their father had stood to the vendor. PARTAB SINGH *v.* DAULAT (1913) . . . **I. L. R. 36 All. 63**

4. ——— *Execution of decree—Decretal amount deposited, but part taken out of Court by a creditor of the decree-holder, the decree for pre-emption having been set aside—Restoration of decree on appeal—Position of decree-holder.* A decree for pre-emption conditional on the plaintiff pre-emptor depositing in Court by a certain date Rs. 1,000 was duly complied with. But on appeal by the vendee the decree was set aside, and thereafter a portion of the money deposited by the pre-emptor was attached and drawn out of Court by a creditor who had obtained a money decree against him. The decree was, however, restored as the result of an appeal to the High Court. *Held*, that the plaintiff was entitled to execute his decree upon making good the amount which had been removed by his creditor. *Held*, also, that the Court of first instance ought not to have permitted any part of the money deposited to be withdrawn until the pre-emption suit had been finally decided. *Abdus Salam* v. *Wilayat Ali, All Weekly Notes (1897) 31*, distinguished. SHEO GOPAL *v.* NAJIB KHAN (1914)
I. L. R. 36 All. 398

5. ——— *Pleadings—Alternative claims under custom and Mahomedan law.* There is nothing to prevent a plaintiff in a suit for pre-emption basing his claim in the alternative, on contract, custom or Mahomedan law. But where there is an established custom of pre-emption and the pre-emptor fails to bring himself within that custom, he cannot fall back on the Mahomedan law. *Muhammad Salim* v. *Sadar-ud-din Beg. 7 All. L. J. 660*, distinguished. MUHAMMAD AHSANULLAH *v.* SHAMS-UN-NISSA BIBI (1914)
I. L. R. 36 All. 456

PRE-EMPTION—*contd.*

6. ——— *Dispute as to true sale consideration—Evidence—Bruden of proof—Payment before Sub-Registrar.* In a suit for pre-emption where it is alleged that the sale price is fictitious and put into the deed for the purpose of defeating pre-emption, it is open to the pre-emptor to give evidence to show that the market price is far below that stated in the sale-deed. If he gives such evidence to the satisfaction of the Court, the latter is quite justified in arriving at its own conclusion as to what was the real consideration, and this notwithstanding that it is proved that the amount stated in the deed was paid before the Sub-Registrar. *Abdul Majid* v. *Amolak, I. L. R. 29 All. 618*, referred to. *O'Conor* v. *Ghulam Haidar, I. L. R. 28 All. 617*, not followed. RAM SARUP SAHU *v.* KARAMULLAH KHAN (1914)

I. L. R. 36 All. 464

7. ——— *Wajib-ul-arz—Custom—Evidence—Entry in wajib-ul-arz clear and unrebutted.* Where there is an entry in the wajib-ul-arz as to the right of pre-emption which is clear and distinct and there is no evidence to the contrary, the Court ought, having regard to the prevailing practice, to hold that the custom of pre-emption exists. *Returaji Dubain* v. *Pahlwan Bhagat, I. L. R. 33 All. 196*, referred to. *Dhian Kunwar* v. *Diwan Singh, 8 All. L. J. 786*, distinguished. FAZAL HUSAIN *v.* MUHAMMAD SHARIF (1914) . . . . **I. L. R. 36 All. 471**

8. ——— *Practice—Alternative claims—Claim for possession as owner joined with alternative claim for pre-emption.* There is nothing in law to prevent a plaintiff in a suit for pre-emption also setting up a claim for possession of the property as owner and his suit ought not to be dismissed on the ground that he has put his case in the alternative. BHAGWATI SARAN MAN TIWARI *v.* PARMESHAR DAS (1914) . **I. L. R. 36 All. 476**

9. ——— *Mahomedan law—Vendor a Shia and pre-emptor a Sunni—Shia law to be applied.* In a suit for pre-emption the vendor was a Shia Mahomedan, the vendees Hindus, and the pre-emptor a Sunni. The claim was laid in the alternative either on custom or on the Mahomedan law. The custom set up was not proved. *Held*, that the Mahomedan law applicable was that of the vendor, namely, the Shia law, and that the pre-emptor had no case. *Jog Deb Singh* v. *Mahomed Afzal, I. L. R. 32 Calc. 982*, not followed. *Abbas Ali* v. *Maya Ram, I. L. R. 12 All. 229, Qurban Husain* v. *Chote, I. L. R. 22 All. 102*, and *Gobind Dayal* v. *Inayatullah, I. L. R. 7 All. 775*, referred to. PIR KHAN *v.* FAIYAZ HUSAIN (1914)

I. L. R. 36 All. 488

10. ——— *Suit decreed—Pre-emptive price enhanced on appeal by the vendee but no time fixed for payment—Practice.* The appellate Court in a pre-emption suit enhanced the amount decreed to be payable by the pre-emption in the first Court, but omitted to fix any time within which the enhanced amount should be payable. *Held*, that the plaintiff pre-emptor was entitled to

PRE-EMPTION—*concld.*

a reasonable time within which to pay in the amount decreed, and having regard to the enhanced amount (Rs. 801) the time within which it was in fact paid (one month and one day after the decree) was reasonable, and the plaintiff was entitled to execute his decree. DEBI SARAN TIWARI *v.* GUPTAR TIWARI (1914) . **I. L. R. 36 All. 514**

11. ——— *Pleadings—Mahomedan Law—Custom—Amendment of plaint—Discretion of Court.* The plaintiff in a suit for pre-emption based his claim upon the Mahomedan law. At a somewhat late stage in the case the plaintiff asked leave to amend his plaint by adding an alternative claim based on custom as evidenced by the wajib-ul-arz; but this was refused, and the Court, notwithstanding that it found that, according to the wajib-ul-arz, a custom of pre-emption existed, dismissed the suit. *Held*, that the Court ought to have permitted the plaint to be amended, and, even without amending the plaint, was competent to decree the claim on the basis of the wajib-ul-arz. ABDUL HAMID *v.* MASIT-ULLAH (1914) . . . . **I. L. R. 36 All. 573**

PREJUDICE.

See CHARGE . **I. L. R. 41 Calc. 66**

PREJUDICE TO ACCUSED.

See CROSS-EXAMINATION.
I. L. R. 41 Calc. 299

PRELIMINARY DECREE.

See CIVIL PROCEDURE CODE (1908), SS. 2, 97; O. XXVI, RR. 11, 12(2).
I. L. R. 38 Bom. 392

See CIVIL PROCEDURE CODE (1908), S. 97.
I. L. R. 38 Bom. 331

PREPARATION.

See DACOITY . **I. L. R. 41 Calc. 350**

See MADRAS ESTATES LAND ACT (MAD. I OF 1908) . . **I. L. R. 37 Mad. 1**

PRESIDENCY SMALL CAUSE COURT.

——— **judgment of—**

See APPEAL . **I. L. R. 41 Calc. 323**

PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882).

——— **ss. 6, 41—**

See APPEAL . **I. L. R. 41 Calc. 323**

——— **s. 69.**

See CAUSE OF ACTION.
I. L. R. 41 Calc. 825

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909).

——— **s. 9** (*d*) **III**—*Adjudication, petition for, what to contain—Leave to amend, when to be given.* A petition for adjudication in bankruptcy

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909)—*contd.*

——— **s. 9**—*concld.*

alleged that the debtors "did depart from their place of business and residence and are secreting themselves so as to deprive their creditors of the means of communicating with them whereby your petitioners are advised and believe that the said insolvents are liable to be adjudged to have committed an act of insolvency." An affidavit in support of this petition alleged the indebtedness of the debtors and that they had left Madras leaving no one in charge of their respective business and "are secreting themselves for the purpose of evading their creditors." *Held*, that these allegatiors were a sufficient compliance with s. 9*d*(iii) of the Insolvency Act. The statement of intent to defeat or delay the creditors must appear either in the petition or in the affidavit; otherwise, the petition is liable to be dismissed as the omission to state it is a substantial defect incurable by amendment. An omission to state the fact that the petitioning creditor is a secured creditor and the value of his security, as required by s. 12(*2*) and Rule 21, is one that could be cured by amendment. WHITE, *C. J.*—Leave to amend a petition by inserting new causes of action should not be given at a time when by doing so the Court would be depriving the defendant of the plea of limitation. WALLIS, *J.* (*dubitante*), whether under peculiar circumstances leave could not be given in such cases. *Per* WALLIS, *J.*—The passage (in the petition) conveys with sufficient certainty that the debtors committed an act of insolvency by leaving their place of business and residence with intent to defeat and delay their creditors. But if that act of insolvency is not expressed with sufficient certainty we are at liberty to look at the affidavit and after reading the petition with the affidavit to find that the act of insolvency is charged with sufficient certainty. *Ex parte Coates, In re Skelton, 5 Ch. D. 979*, distinguished. GUNNIS & Co. *v.* MAHOMED AYYUB SAHIB (1913)

I. L. R. 37 Mad. 555

——— **ss. 15 (*2*) and 21 (*1*)**—*Adjudication, annulment of, when Court has jurisdiction to pass order for— Debts, necessity that all debts of the insolvent actually and properly proved in the bankruptcy should have been fully paid in cash—Conduct of insolvent applying for annulment of an adjudication order, duty of Court to scrutinize—Discretion of Court, how exercised.* A debtor who has been adjudicated insolvent on his own petition cannot, even with the leave of the Court, withdraw his petition. S. 15 (*2*) of the Presidency Towns Insolvency Act only applies to petitions that are pending before any order has been made, as also does s. 13 (*8*) dealing with petitions by creditors. Once an order of adjudication has been made, the debtor becomes an insolvent and remains so until the order of adjudication is annulled or he obtains his discharge. The Court can only annul the order of adjudication under s. 21 of the Act, if the Court is of opinion that the debtor ought not to have been adjudicated insolvent or it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full and in the latter case the "debts" including at least all debts actually and properly proved in bankruptcy must have been fully paid in cash. It is the duty of the Court to scrutinize the conduct of an insolvent applying for an order of annulment. The Court is given a discretion by s. 21, and it would not be a good exercise of that discretion to make an order of annulment of an adjudication where, if the insolvent were applying for his discharge, an order of discharge would not be granted. *In re Keet, [1905] 2 K. B. 666, 677*, applied. *In the matter of* MEGHRAJ GANGABUX (1912)

I. L. R. 38 Bom. 200

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909)—*concld.*

——— **ss. 15, 21**—*concld.*

——— **s. 17**—*Leave of Court—Power of secured creditor of adjudicated insolvent to realise his security by means of a regular suit without obtaining leave.* *A*, having obtained a decree in a suit brought by him against *B* for the payment of a sum of money, assigned the decree to *C* by way of mortgage to secure the repayment of monies advanced by *C* to *A*. Subsequently *A* became insolvent and his property being vested in the Official Assignee the latter executed the decree against *B* and obtained payment of the amount due from *B* in full. Subsequently *C*, without the leave of the Court first obtained, brought a suit against the Official Assignee to recover the amount due to him as mortgagee of the decree against *B* out of the monies so recovered by the Official Assignee. *Held*, that the Official Assignee, having executed a decree which had been assigned by way of security, was in the position of a mortgagor who had sold the mortgaged property and was in possession of the sale-proceeds, that until the claim of the mortgagee had been satisfied the insolvent or his Official Assignee had no right to the proceeds of the decree and that the secured creditor in such a case might file a suit to obtain payment of his claim out of the amount so recovered by the Official Assignee without obtaining the leave of the Court under s. 17 of the Presidency Towns Insolvency Act as the proviso to s. 17 covered a suit by a mortgagee to realise his security. LANG *v.* HEPTULLABHAI ISMAILJI (1913) . . **I. L. R. 38 Bom. 359**

PRESS.

——— **members of the—**

See LIBEL ON MAGISTRATE.

I. L. R. 41 Calc. 1023

PRESS ACT (I OF 1910).

——— **ss. 4, 12, 17, 19, 22—**

See FORFEITURE **I. L. R. 41 Calc. 466**

PRESUMPTION.

See HINDU LAW—ADOPTION.

I. L. R. 37 Mad. 529

PRESUMPTION—*concld.*

——— nature of—

See EVIDENCE ACT (I OF 1872), SS. 107, 108 . . **I. L. R. 37 Mad. 440**

PRESUMPTION OF RIGHT.

See EJECTMENT, SUIT FOR.
I. L. R. 38 Bom. 240

PREVIOUS DEPOSITIONS.

See ADMISSIONS AND CONFESSIONS TO POLICE OFFICERS.
I. L. R. 41 Calc. 601

PRIMOGENITURE.

See HINDU LAW—SUCCESSION.
18 C. W. N. 55

PRINCIPAL AND AGENT.

——— *Committee for collection of subscriptions to rebuild a mosque—Neglect of treasurer to pay his own subscription and to collect other subscriptions promised—Treasurer not legally liable.* A movement having been set on foot for re-constructing a mosque, *A* and *J* promised to subscribe Rs. 500 each. *A* was appointed treasurer of the committee for collecting subscriptions. *J* gave a cheque for his promised subscription of Rs. 500, but owing, first, to some defect in the endorsement and later on to its having become out of date, it was never cashed. The mosque also was never re-constructed. *A* having died, his heirs were sued by the members of the committee for the amount of the unpaid subscriptions. *Held*, that neither *A* nor his heirs were liable for payment of the money. ABDUL AZIZ *v.* MASUM ALI (1914)
I. L. R. 36 All. 268

PRIVATE INTERNATIONAL LAW.

See FOREIGN JUDGMENT, SUIT ON.
I. L. R. 37 Mad. 163

PRIVILEGE.

——— for statement in complaint to Magistrate—

See PENAL CODE (ACT XLV OF 1860), S. 498 . . **I. L. R. 37 Mad. 110**

PRIVY COUNCIL, LEAVE TO APPEAL TO.

——— *Final order—Interlocutory order—Order rejecting an application for bringing on record the legal representatives of a deceased party to a pending appeal—Amended Letters Patent, clause 39—Civil Procedure Code (Act V of 1908), ss. 109, 110.* The applicant, claiming to be the legal representative of a deceased party to a pending appeal, applied to have his name brought on the record. The High Court disallowed the application and ordered the names of the heirs of the deceased to be substituted. The applicant applied for leave to appeal to His Majesty in Council from the order rejecting the application: *Held*, that the order having been passed on an application in a pending appeal, was not a final, but an interlocutory, order; and that no appeal lay from it to His Majesty in Council under the provisions of clause 39 of the Amended Letters Patent. GANGAPPA REVANSHIDAPPA *v.* GANGAPPA MA LESHAPPA (1914)
I. L. R. 38 Bom. 421

PRIVY COUNCIL, LEAVE TO APPEAL TO—*concld.*

PRIVY COUNCIL, PRACTICE OF.

See DECREE, ASSIGNMENT OF.
I. L. R. 37 Mad. 227

See HINDU LAW—IMPARTIBLE ESTATE.
I. L. R. 37 Mad. 199

See LIMITATION ACT (XV OF 1877), S. 4; SCH. II, ART. 179(2).
I. L. R. 36 All. 284

1. ——— *Special leave to appeal—Appeal in criminal case—Grounds for refusing special leave to appeal.* In this case the main grounds of appeal were that the Judge had, during the trial, wrongly amended the charge to the prejudice of the petitioners; improper admission of evidence; misdirection; and that the sentences contravened the provisions of s. 71 of the Penal Code (Act XLV of 1860). But their Lordships were of opinion that in what had been done there was nothing grossly contrary to the forms of justice, nor any violation of fundamental principles, and therefore refused to grant special leave to appeal to His Majesty in Council on the ground that they had no power to interfere. *Dillet, In re, L. R. 12 A. C. 459*, followed. CLIFFORD *v.* KING-EMPEROR (1913) . **I. L. R. 41 Calc. 568**

2. ——— *Practice in appeals in criminal cases—Charge of defamation against editor of newspaper for publication of criminal libels—Penal Code (Act XLV of 1860), s. 499, Exceptions 1, 2, 9 and s. 52—Position of members of the Press and of Judges—Libel on Magistrate in respect of conduct of criminal trial—Charge to Jury—Misdirection—Powers and functions of Judicial Committee in criminal cases.* No kind of privilege attaches to the profession of the Press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever length the subject in general may go, so also may the journalist, but apart from statute law his privilege is no other and no higher. The responsibilities which attach to his power of dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments is as wide as, and no wider than, that of any other subject. No privilege attaches to his position. Nor does any privilege or protection attach to the public acts of a Judge which exempts him, in regard to these, from free and adverse comment. He is not above criticism, his conduct and utterances may demand it. Freedom would be seriously impaired if the judicial tribunals were outside of the range of such comment. The appellant, the Editor of the *Burma Critic*, a newspaper published in Rangoon, was charged under s. 499 of the Penal Code with having, in certain articles

PRIVY COUNCIL, PRACTICE OF—*contd.*

entitled "A Mockery of British Justice," defamed a District Magistrate with reference to his alleged conduct in the trial of a case in which a European resident in the district was acquitted on charges of abduction and rape of a native girl of 11 or 12 years. His defence was under the 9th exception to s. 499, and he pleaded admitting the libels to be false that he published them in good faith for the public good, and believing them to be true after having taken due care and attention in the matter of their publication. He did not, however, disclose what were the actual things upon which he founded his own beliefs, nor what the steps, if any, were he took to investigate their truth before giving them to the public. He was tried in the Chief Court of Lower Burma before the Chief Judge with a jury, and was found guilty and sentenced to one year's imprisonment, after serving four months of which he was discharged, the rest of the sentence being remitted. He obtained special leave to appeal mainly on the ground that, there had been misdirection, resulting in an exceptional miscarriage of justice which had caused him substantial wrong. *Held*, on the facts, that a fair and statable case in support of the statutory defence, and his belief that the libels were true, had been put forward for the appellant; and for the respondent a case was made which was also fair and statable, so that there was material before the jury on both sides, and the determination was on a subject peculiarly within the jury's province. The case was not improperly withdrawn from the jury's domain on fact, and they were not misdirected in law. A charge to a jury must be read as a whole If there are salient propositions of law in it, these will of course be the subject of separate analysis. But in a protected narrative of fact, the determination of which is ultimately left to the jury, it, must needs be that the view of the Judge may not coincide with the view of others who look upon the whole proceedings in black type. It would, however, not be in accordance with usual or good practice to treat such cases as cases of misdirection if, upon the general view taken, the case has been fairly left within the jury's province. But in any case in the region of fact their Lordships of the Judicial Committee would not interfere unless something gross amounting to a complete misdescription of the whole bearing of the evidence has occurred. The appeallant's defence being as above, and involving an admission that the libels were false, his counsel at the trial by statements and innuendoes which were reiterated throughout the case, endeavoured to withdraw the pleaded defence and to persuade the jury that what was stated in the defamatory articles was true. *Held*, that it could not be considered misdirection for the Judge in charging the jury to put before them a narrative of the real facts of the case as disclosed by the evidence, showing what was in accordance with the pleaded defence, namely, the falsity of the libels, and the consequent innocence of the Magistrate on the charges against him. The letters put in evidence as to the

PRIVY COUNCIL, PRACTICE OF—*contd.*

charges that the Magistrate had conspired to suddenly leave the complainants in the abduction and rape case without an advocate, and to furnish them with a false interpreter, though not before the appellant when he wrote the defamatory articles, were before him in the course of his trial; and when it was discovered that they were not true and that a gross mistake on a matter of fact had been made, those libels should not have been adhered to for a moment: the mistake should have been acknowledged and an apology tendered; instead of which the case was conducted to its close upon the footing that an unstated defence was the real and good defence, namely, that all the libels were true. The question of the special position and functions of the Judicial Committee, and their powers and practice as advisers of the King in criminal matters is not truly one of jurisdiction. The power of His Majesty under his Royal authority to review proceedings of a criminal nature, unless where such power and authority have been parted with by Statute, is undoubted. On the other hand, there are reasons both constitutional and administrative which make it manifest that this power should not be lightly exercised. The overruling consideration upon the topic has reference to justice itself. If throughout the Empire it were supposed that the course and execution of justice could suffer serious impediment which in many cases might amount to practical obstruction, by an appeal to the Royal Prerogative of review on judicial grounds, then it becomes plain that a severe blow would have been dealt to the ordered administration of law within the King's dominions. The views expressed by Dr. Lushington in *The Queen* v. *Joykisen Mookerjee, 1 Moo. P. C. N. S. 272*, and the principle and practice laid down by Lord Kingsdown in *The Falkland Islands Company* v. *The Queen, 1 Moo. P. C. N. S. 299*, still remain those which are followed by the Judicial Committee in appeals in criminal matters. The principle laid down in *Re Dillett, L. R. 12 A. C. 459*, that the course of criminal proceedings will not be reviewed or interfered with by the Privy Council "unless it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise substantial or grave injustice has been done," is not to be interpreted in the sense that wherever there had been a misdirection in any criminal case leaving it uncertain whether that misdirection did or did not affect the jury's mind, that then in such case a miscarriage of justice could be affirmed or assumed. The Judicial Committee is not a Court of Criminal Appeal. In general its practice is to the following effect: It will not interfere with the course of criminal law unless there has been such an interference with the elementary right of an accused as has placed him outside of the pale of the regular law, or within that pale there has been a violation of the natural principles of justice so demonstratively manifest as to convince their Lordships, *first*, that the result arrived at was opposite to the result which they

PRIVY COUNCIL, PRACTICE OF—*contd.*

themselves would have reached; and, *secondly*, that the same opposite result would have been reached by the local tribunal also if the alleged defect or misdirection had been avoided. *Makin* v. *Attorney-General for New South Wales*, [*1894*] *A. C. 57*, *Vaithinatha Pillai* v. *The King-Emperor*, *I. L. R. 36 Mad. 501*; *L. R. 40 I. A. 193*, and *Lanier* v. *The King*, [*1914*] *A. C. 221*, distinguished. It must be established demonstrably that justice itself in its very foundations has been subverted, and that it is therefore a matter of general Imperial concern that by way of an appeal to the King it can be restored to its rightful position in that part of the Empire. The authority of decisions of the Court of Criminal Appeal in England which apply to a different system, a different procedure, and a different structure of principle, must stand out of the reckoning of any body of authority in the matter of the procedure of the Judicial Committee in advising His Majesty. *Clifford* v. *The King-Emperor*, *I. L. R. 41 Calc. 568*; *L. R. 40 I. A. 241*, approved. ARNOLD *v.* KING-EMPEROR (1914)

I. L. R. 41 Calc. 1023

3. ——— *Dismissal of appeal for want of prosecution—No judicial decision of suit—Limitation Act (XV of 1877), Sch. II, Arts. 179, 180—Application for order absolute for sale under Transfer of Property Act (IV 1882), s. 89—Final decree or order of Appellate Court.* An order of His Majesty in Council dismissing an appeal for want of prosecution, does not deal judicially with the matter of the suit, and can in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognized authoritatively that the appellant has not complied with the conditions under which the appeal was open to him, and that therefore he is in the same position as if he had not appealed at all. Where, therefore, in a suit to enforce a mortgage a preliminary decree for sale was made by the Subordinate Judge on the 12th of May 1890, which was confirmed by the High Court on the 8th of April 1893, and an appeal to the Privy Council was admitted, but was dismissed for want of prosecution on the 13th of May 1901: *Held* (reversing the decisions of the Courts in India), that the period of limitation for an application under s. 89 of the Transfer of Property Act (IV of 1882) to make absolute the decree for sale was not 12 years under Art. 180 of Sch. II of the Limitation Act, 1877, but three years under Art. 179, and limitation ran not from the dismissal of the appeal for want of prosecution, but from the order of the High Court confirming the decree, which was "the final order of the Appellate Court," and did not become merged in the order of the Privy Council. *See Batuk Nah* v. *Munni Dei*, *I. L. R. 36 All. 284.* The right to enforce the decree had therefore been barred before the passing of the Civil Procedure Code, 1908 (under which the present applicationpurported to be made), and no provision of thatAct operated to revive it. ABDUL MAJID *v.* JAWAHIR LAL 1914) . . . . **I. L. R. 36 All. 350**

PRIVY COUNCIL, PRACTICE OF—*concld.*

4. ——— *Privy Council, interference of, in criminal case—Invasion of liberty and just rights of a citizen—Embezzlement—Criminal and Civil liability, distinction between—Costs against Crown in criminal appeal.* The appellant, who was a member of a firm, was authorised by the guardian of two minors by a power-of-attorney to act for the guardian in collecting and investing the minors' property. Acting under this authority, funds were received and remittances made from time to time by the appellant's firm with whom an account was opened in the name of the minors. A certain amount due to the minors from a creditor was paid by him in the shape of crediting it to the appellant's firm in their account with their bankers which account was overdrawn. The minors' account with the appellant's firm was duly credited with that amount. The appellant being thereafter asked to give a guarantee for the funds of the minor in his hand gave security to the satisfaction of the authorities. Thereafter criminal proceedings were instituted against the appellant who was tried by the Chief Justice without a jury and convicted of having embezzled the minor's money: *Held*, that the facts did not on any just or legal view of them warrant a conviction, and the grounds of distinction between the categories of liability in a civil as distinguished from a criminal suit appeared in the present case to have been left out of judicial view. That the Judicial Committee of the Privy Council does not lightly interfere in criminal cases but in the present case, although the proceedings taken were unobjectionable in form, justice had gravely and injuriously miscarried and the sentence pronounced against the appellant formed such an invasion of liberty and such denial of his just rights as a citizen that their Lordships felt called upon to interfere. Having regard to the exceptional nature of the case their Lordships directed the Crown to pay to the appellant the costs of the appeal. LANIER *v.* THE KING (1913) . **18 C. W. N. 98**

5. ——— *Privy Council, practice of, in case of concurrent findings by lower Courts.* When there are concurrent findings of the Courts below on an issue of fact, the Judicial Committee accepts these findings unless it is established that the judgments of the Courts below are clearly wrong. *Allen* v. *Quebec Warehouse Company*, *12 A. C. 101*, referred to. SURJA KANTA ACHARJYA *v.* SARAT CHANDRA ROY CHOWDHURY (1914)

18 C. W. N. 1281

PROBATE.

See EVIDENCE ACT (I OF 1872), S. 41.

I. L. R. 38 Bom. 309

See INAM LANDS.

I. L. R. 38 Bom. 272

See LIMITATION ACT (IX OF 1908) S. 17.

I. L. R. 37 Mad. 175

See PROBATE AND ADMINISTRATION ACT.

See PROBATE PROCEEDINGS.

——— ——— *Defendant—Limitation—Limitation Act (IX of 1908), s. 164—Its applicability*

PROBATE—*concld.*

to probate proceedings—Probate and Administration Act (V of 1881), s. 83. S. 164 of the Limitation Act does not apply to the case of one who is not a defendant in a probate proceeding. Merely citing a person in a probate-application does not make him a defendant. Under s. 83 of the Probate and Administration Act the case must be contentious and the person cited must appear to oppose the grant before he becomes a defendant. The limitation laid down in Art. 164 of the Limitation Act applies to the case of a defendant as understood by s. 83 of the Probate and Administration Act. *Bai Manekbai* v. *Manekji Kavasji, I. L. R. 7 Bom. 213, Tiluck Singh* v. *Parsotein Proshad, I. L. R. 22 Calc. 924, Rahmat Karim* v. *Abdul Karim, I. L. R. 34 Calc. 672,* referred to. SAROJA SUNDARI BASAK *v.* ABHOY CHARAN BASAK (1914) . **I. L. R. 41 Calc. 819**

PROBATE AND ADMINISTRATION ACT (V OF 1881).

See LIMITATION ACT (IX OF 1908).
I. L. R. 37 Mad. 175

See EVIDENCE ACT (I OF 1872), SS. 40, 41, 42, 44 . . **I. L. R. 38 Bom. 427**

——— **s. 83—**

See EVIDENCE ACT (I OF 1872), S. 41.
I. L. R. 38 Bom. 309

See PROBATE . **I. L. R. 41 Calc. 819**

——— **s. 98—**

See COURT FEES AMENDMENT ACT, 1899, S. 19 H . . **I. L. R. 41 Calc. 556**

PROBATE-PROCEEDINGS.

See PLEADER'S FEE.
I. L. R. 41 Calc. 637

PROCEDURE.

See CIVIL PROCEDURE CODE (1908), O. II, R. 2; O. XXXIV, R. 14.
I. L. R. 36 All. 264

See CRIMINAL PROCEDURE CODE, SS. 107 145 . . **I. L. R. 36 All. 143.**

See CRIMINAL PROCEDURE CODE, SS. 244, 540 . . . **I. L. R. 36 All. 13**

See CRIMINAL PROCEDURE CODE, SS. 250, 537 . . **I. L. R. 36 All. 132**

See CRIMINAL PROCEDURE CODE, S. 282.
I. L. R. 36 All. 481

See CRIMINAL PROCEDURE CODE, SS. 373, 375 A . . **I. L. R. 36 All. 172**

See EXCISE . **I. L. R. 41 Calc. 694**

See GUARDIANS AND WARDS ACT (VIII OF 1890) CH. II . **I. L. R. 36 All. 282**

See LIMITATION ACT (IX OF 1908), S. 5.
I. L. R. 36 All. 235

See PROVINCIAL INSOLVENCY ACT (III OF 1907), SS. 13 (*3*), 47.
I. L. R. 36 All. 65

PROCEDURE—*concld.*

See PROVINCIAL INSOLVENCY ACT (III OF 1907), SS. 26, 22, 46.
I. L. R. 36 All. 8

See UNITED PROV. MUNICIPALITIES ACT (I OF 1900), SS. 87, 152.
I. L. R. 36 All. 329

PROFESSION.

See PROSTITUTION.
I. L. R. 37 Mad. 565

PROFESSIONAL MISCONDUCT.

——— ——— *Attorney, disciplinary jurisdiction over—Striking off the rolls—Letters Patent, 1865, cl. 10—Right of aggrieved person—Practice—Verification.* Disciplinary action against an attorney, rests on the principle that the Court deems him an unfit person to act as an attorney and is not by way of punishment. Any person aggrieved by the misconduct of an attorney has the right to invoke the disciplinary jurisdiction of the Court. *In re A Solicitor, L. R. 25 Q. B. D. 17,* followed. On an application by an aggrieved party to have an attorney struck off the rolls of attorneys on the ground of professional misconduct: *Held,* that where there was a positive sworn denial of the misconduct by the attorney coupled with an explanation which was not demonstrably false, even a strong case of suspicion would not justify disciplinary action against the attorney on a summary proceeding. The procedure to be adopted in invoking the disciplinary jurisdiction of the Court against an attorney, enunciated. *In the matter of* AN ATTORNEY (1913)
I. L. R. 41 Calc. 113

PROMISSORY NOTE.

See PRACTICE—CAUSE OF ACTION.
L. R. 41 I. A. 142

——— **acknowledgment contained in—**

See LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 116 AND 66, S. 19.
I. L. R. 38 Bom. 177

PROPERTY.

——— **transfer of, to another jurisdiction—**

See CIVIL PROCEDURE CODE (ACT V OF 1908), SS. 37, 38, 150.
I. L. R. 37 Mad. 462

PROPERTY TITLE.

——— **question of—**

See AGRA TENANCY ACT (II OF 1901), S. 177(*e*) . **I. L. R. 36 All. 183**

PROSECUTION.

—— **what amounts to—**

See MALICIOUS PROSECUTION.
I. L. R. 37 Mad. 181

PROSECUTOR.

See CONTEMPT OF COURT.
I. L. R. 41 Calc. 173

PROSTITUTION.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), S. 488 (*1*).

I. L. R. 37 Mad. 565

PROVIDENT INSURANCE SOCIETIES ACT (V OF 1912).

——— **s. 2, sub-sec. (8), ss. 6, 21**—*Registration if necessary of company with its share-capital divided into shares.* A company under the name and style of the New King Insurance Co., Ld., was started for the purpose of carrying on business as a provident insurance society. Two of the directors of the company were prosecuted for having failed to apply for registration under s. 6 of the Provident Insurance Societies Act of 1912 and thereby having committed an offence under s. 21 of the Act. The Chief Presidency Magistrate acquitted the accused on the ground that the company was one which had its share-capital divided into shares and the provisions of the Act did not apply to such a company : *Held* (on appeal by the Local Government), that the Provident Insurance Societies Act was intended to prevent a company from embarking in the business of life insurance unless and until it had been registered under the Act and s. 2, sub-s. (*8*) clearly lays down that whether the society already in existence is a corporate company before or whether its share-capital is divided into shares or not, registration under the Act is necessary before business can be carried on under the conditions laid down in the Act. *Oriental Government Security Life Insurance Co., Ltd.* v. *Oriental Assurance Co., Ltd., I. L. R. 40 Calc. 570*, referred to. DEPUTY LEGAL REMEMBRANCER *v.* SITAL CHANDRA PAL (1914)

18 C. W. N. 1182

PROVINCIAL INSOLVENCY ACT (III OF 1907).

——— **ss. 5, 6, 15, 16**—*Insolvency—Petition by debtor—Grounds for dismissing petition—Possibility of assests exceeding liabilities.* Where an insolvency petition is presented by a debtor whose debts amount to Rs. 500 and such petition fulfils the requirements of s. 11 of the Provincial Insolvency Act, 1907, it is not a valid ground for dismissing the petition that there may exist some reason for supposing that the debtor may not after all be unable to pay his debts in full, unless there are circumstances indicating that the presentation of the petition was fraudulent and an abuse of the process of the Court. The provisions of s. 15 of the Act are intended to apply to a creditor's petition and not to one presented by a debtor. *Uday Chand Maiti* v. *Ram Kumar Khara, 15 C. W. N. 213, Kali Kumar Das* v. *Gopi Krishna Roy, 15 C. W. N. 990, Girwardhari* v. *Jai Narain, I. L. R. 32 All. 645, Bidhata Din* v. *Jagannath, 9 All. L. J. 699*, referred to. *Nathu Mal* v. *The District Judge of Benares, I. L. R. 32 All. 547*, distinguished. *Ponnusami Chetti* v. *Narasimma Chetti, 25 Mad. L. J. 545*, not followed. TRILOKI NATH *v.* BADRI DASS (1914) . **I. L. R. 36 All. 250**

——— **s. 6, sub-sec. (2)**—*Jurisdiction of Court—"Ordinarily resides," meaning of—Order of adjudication by Court not having jurisdiction—S. 47, sub-s. (1), effect of—Civil Procedure Code (Act V of 1908), s. 21, if applies to proceedings under the Provincial Insolvency Act.* The respondent lodged an application for insolvency in the Court of the District Judge of Midnapur and obtained an order of adjudication. It appeared that the respondent, who was employed as a guard on the Bengal-Nagpur Railway, resided at Dungagarh in the Central Provinces and ran his train ordinarily from Dungagarh to Nagpur and only occasionally from Dungagarh to Kharagpur, where he stopped with his son-in-law having no permanent residence there. The application for insolvency was filed immediately after the appellant had obtained a decree against the respondent in the Court of the Munsif of Midnapur : *Held*, that it could not be held that the respondent ordinarily resided or personally worked for gain at Kharagpur within the meaning of sub-s. (*2*) of s. 6 of the Provincial Insolvency Act, and consequently the Court of the District Judge of Midnapur had no jurisdiction to deal with the application for insolvency filed by the respondent. That sub-s. (*1*) of s. 47 of the Provincial Insolvency Act does not directly or by implication make s. 21 of the Civil Procedure Code of 1908 applicable to proceedings under the Provincial Insolvency Act and consequently the doctrine that no objection as to the place of suing shall be allowed by an Appellate Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and unless there has been a failure of justice, could not be applied to proceedings under the Provincial Insolvency Act. Meaning of the term "resides" in sub-s. (*2*) of s. 6 considered. MADHO PERSHAND *v.* A. L. WALTON (1913)

18 C. W. N. 1050

——— **ss. 13** (*3*), **47**—*Attachment of property as that of the insolvent before adjudication of insolvency—Civil Procedure Code (1908), O. XXI, r. 58 ; O. XXXVIII, r. 5 to 12—Procedure—Appeal.* Where certain property was attached under s. 13 (*3*) of the Provincial Insolvency Act, 1907, by a Court exercising jusrisdiction under that Act, before the petitioner was declared an insolvent and a receiver appointed, it was *held* that the Court was bound to hear and adjudicate upon any claims which might be preferred by persons alleging themselves to be in fact the owners of such property. Procedure under s. 13 (*3*) of the abovementioned Act was analogous to attachment before judgment under the Code of Civil Procedure. It might have been open to the objectors to wait until the receiver had taken some action in respect of the property attached and then to apply under s. 22 of the Act, but this they were not bound to do. HASHMAT BIBI *v.* BHAGWAN DAS (1913)

I. L. R. 36 All. 65

——— **s. 16, sub-s. (2), cl. (a) ; ss. 27, 42, sub-s.** (*1*)—*Direction for deposit in Court of one-fourth of insolvent's monthly salary which*

PROVINCIAL INSOLVENCY ACT (III OF 1907) —*contd.*

s. 6—*concld.*

PROVINCIAL INSOLVENCY ACT (III OF 1907) —*contd.*

———— **s. 16**—*concld.*

exceeded Rs. 40, if legal—Order for adjudication when can be subsequently annulled—"Salary" if "property" of insolvent—Jurisdiction of High Court to give directions regarding order of adjudication, when only the order annulling it is under appeal. A debtor who was arrested in execution of a decree applied to be and was adjudged an insolvent. In the order of adjudication the insolvent was directed, pending realisation by sale of his assets, to pay a quarter of his monthly salary of Rs. 100 a month into Court until the sum realised from him should equal one-third of the debts for which the creditor had obtained a decree. Subsequently, the District Judge annulled the order of adjudication on the ground that the insolvent had failed to abide by the condition regarding payment of one-fourth of his salary: *Held*, that the direction regarding the payment of one-fourth of the insolvent's salary could not have been given under the Provincial Insolvency Act. The proper course for the District Judge would have been to direct the Receiver to arrange for payment to him of one-half of the salary earned by the insolvent, "salary" being "property" of the insolvent within the meaning of s. 16, sub-s. (*2*) cl. (*a*), only one-half of the salary which exceeded Rs. 40 a month being exempt from attachment under s. 60, Civil Procedure Code. That the subsequent order of the District Judge annulling the order of adjudication could not have been made under sub-s. (*1*) of s. 42, the conditions required by that section being absent in the present case. That when setting aside, at the instance of the insolvent, the order of the lower Court whereby it annulled the adjudication and which was the only order under appeal, it was open to the High Court to consider what directions should be given regarding the order of adjudication which was modified to the extent that the condition imposed was discharged, the District Judge being ordered to give the necessary direction according to law. RAM CHANDRA NEOGI *v.* SHYAMA CHARAN BOSE (1913) . . **18 C. W. N. 1052**

———— **ss. 20, 22, 46**—*Civil Procedure Code (1908), O. XXI, r. 58—Insolvency—Property taken by receiver as property of insolvent—Objection by third party claiming to be owner—Procedure—Appeal.* A receiver appointed under the Provincial Insolvency Act, 1907, took possession, at the instance of one of the creditors, of certain property which was believed to be that of the insolvent. A third party came into Court and applied under O. XXI, r. 58, of the Code of Civil Procedure, claiming the property as his, and, when his application was rejected, appealed to the High Court. *Held*, that the applicant's proper remedy was under s. 22 of the Provincial Insolvency Act, and that an appeal did not lie as of right, but only by leave of the District Court or of the High Court. *Quære*: Whether an Additional District Judge, to whom a matter under the Provincial Insolvency Act had been made over by the District Judge, was a "District Court" within the meaning of the Act. MUL CHAND *v.* MURARI LAL (1913) . . **I. L. R. 36 All. 8**

PROVINCIAL INSOLVENCY ACT (III OF 1907) —*contd.*

———— **ss. 20, 22, 46**—*concld.*

———— **s. 22**—*Receiver of adjudicated insolvent's estate, issue of sale proclamation by—Property belonging to stranger included in sale—Right of stranger to move Court—Stranger, if a person "aggrieved"—Limitation—Inherent power of Court to restrain its officer from acting in excess of authority.* When during the pendency of insolvency proceedings against his judgment-debtor, the decree-holder executed his decree which was a mortgage-decree and in execution purchased the mortgaged properties and the judgment-debtor was subsequently adjudicated an insolvent and a Receiver was appointed who sent to Court a sale proclamation which included the properties purchased by the mortgagee, and more than 21 days after the sale proclamation was served the mortgagee presented a petition in Court urging that the Receiver had no authority to sell the properties purchased by him: *Held*, that the mortgagee was not a person "aggrieved" by the Receiver's act within the meaning s. 22 of the Insolvency Act and his objection was not subject to the limitation provided in that section. That the Court was competent to deal with the objection, as the Court has inherent authority to review the conduct of a Receiver appointed by it and to make an appropriate order so that a stranger may not be prejudiced by any act of the Receiver in excess of his authority. That it was competent to such stranger to bring any such act of the Receiver to the notice of the Court and it was the duty of the Court to inquire into it. "A person aggrieved" is a person who has suffered a legal grievance—a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully affected his title to something, and does not mean a person who has lost a benefit which he might have obtained if an order had been made. *Ex parte Sidebotham, 14 Ch. D. 458*, referred to. HANSESHUR GHOSH *v.* RAKHAL DAS GHOSH (1913) **18 C. W. N. 366**

———— **s. 36**—*Insolvent—Question of bonâ fides of transfer by insolvent—District Judge not competent to refer to Subordinate Court. Held*, that a Court exercising insolvency jurisdiction under Act No. III of 1907 has no power to refer for inquiry to a subordinate Court a question arising under s. 36 of the Act as to whether a mortgage executed by an insolvent was *bonâ fide* or not. JAGANNATH *v.* LACHMAN DAS (1914) . **I. L. R. 36 All. 549**

———— **s. 43**—*Insolvent, acts of bad faith of—Proceedings in their nature criminal—Necessity of framing charge, etc.* A proceeding against a debtor under s. 43 (*2*) of the Provincial Insolvency Act is in the nature of a criminal proceeding and, as in all criminal cases, it is necessary in such a proceeding that there should be a charge, a finding and a conviction as a foundation for the sentence, and everything should be strictly and

PROVINCIAL INSOLVENCY ACT (III OF 1907) —*concld.*

——— **s. 43**—*concld.*

accurately pursued, and if on any of these three points a substantial defect should appear, it would be a ground for reversing the proceeding. HARIHAR SINGH *v.* MAHESHUR PROSAD (1912).

18 C. W. N. 692

——— **ss. 43, 46**—*Additional District Judge—Order punishing debtor for fraudulent dealings with account books—Appeal, whether civil or criminal and to what Court. Held* by RICHARDS, C. J. and BANERJI J. (KNOX J. dissenting), that an appeal from an order of Additional District Judge under s. 43(2) of the Provincial Insolvency Act, 1907, lies directly to the High Court and not to the Court of the District Judge. *Makhan Lal* v. *Sri Lal, I. L. R. 34 All. 382*, followed. *Held*, also, by RICHARDS, C. J., and KNOX and BANERJI, JJ. that such an appeal is an appeal on the civil side of the Court and not a criminal appeal. EMPEROR *v.* CHIRANJI LAL (1914). **I. L. R. 36 All. 576**

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887).

——— **s. 23**—*Plaint in suit of Small Cause Court nature involving question of title returned by Small Cause Court for presentation in Civil Court—Refusal of latter to receive plaint—Remedy, if by appeal or revision—Civil Procedure Code (Act V of 1908), O. VII, r. 10, O. XLIII, r. 1 (a).* When a plaint originally presented in the Small Cause Court is under an order under s. 23 of the Provincial Small Cause Courts Act presented in the ordinary Civil Court, the latter has no authority to refuse to entertain the suit. An order by the latter Court returning the plaint for presentation to the Small Cause Court, was not an order under O. *VII*, r. 10 of the Civil Procedure Code as the plaint had not been originally filed in that Court, and such an order did not require to be set aside by an appeal under O. XLIII, r. 1 (*a*). The High Court in revision set aside the order as one made in violation of the provisions of s. 23 of the Provincial Small Cause Courts Act. CHANDERBODAN KOER *v.* SHEODHOR PURSHAD (1912). **18 C. W. N. 380**

——— **ss. 23, 27**—*Small Cause suit—Question of title—Suit transferred to the ordinary jurisdiction of the Court—No substantial irregularity—Decision on title—Decree not final—Appeal.* In a suit which was originally filed as a Small Cause Court suit in the Court of the Subordinate Judge having both Small Cause and regular jurisdictions, the Judge transferred the suit, at a very early stage, to his file as ordinary Judge as the relief claimed by the plaintiffs depended upon proof or disproof of a title to immoveable property. The Judge then passed a decree deciding the question of title. *Held*, that there was no substantial irregularity in thus effecting the transfer and that it must be taken that the powers conferred by s. 23 of the Provincial Small Cause Courts Act (IX of 1887) were put in force in a regular manner. *Held*, also, that as it was a decree which could not be passed by a Court of

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887)—*concld.*

——— **ss. 23, 27**—*concld.*

Small Causes, it was not a decree falling within the terms of s. 27 of the Provincial Small Cause Courts Act (IX of 1887) and was, therefore, not final but appealable. HARI BALU *v.* GANPATRAO LAKHURJIRAO (1913). **I. L. R. 38 Bom. 190**

——— **Sch. II, Art. 3**—*Failure to perform a contract whether 'an act' within article 3—Suit to recover money under a contract with Government, whether of a small cause nature—Second appeal.* Failure by Government to carry out a contract under which the plaintif was entitled to a sum of money on account of certain constructions made by him, is not 'an act' purporting to be done by an officer of Government in his official capacity within the meaning of Art. 3, Sch. II of the Provincial Small Cause Courts Act (IX of 1887). The article applies only to a suit relating to some distinct act done by an officer of Government. *Rajmal Manikchand* v. *Hanmant Anyaba, I. L. R. 20 Bom. 697*, and *Chaganlal Kishoredas* v. *The Collector of Kaira, I. L. R. 35 Bom. 42*, applied. *Bunwari Lal Mookerjee* v. *The Secretary of State for India, I. L. R. 17 Calc. 290*, and *Motti Rangayya Chetti* v. *The Secretary of State for India, I. L. R. 28 Mad. 213*, referred to. A suit to recover a sum of money being less than Rs. 500 under such a contract is a suit of a Small Cause Court nature, and no second appeal lies. SECRETARY OF STATE FOR INDIA *v.* RAMABRAHMAM. (1912).

I. L. R. 37 Mad. 533

——— **Sch. II, Art. 28**—*Suit of a small cause nature—Second Appeal.* Plaintiff sued for the recovery of certain jewels which she had presented to her daughter and son-in-law at their marriage, basing her claim on a caste custom by which she was entitled, after the death of the pair, to return of the jewels presented by her. *Held*, that the right claimed was not a right to inherit the jewels as the property of the bridegroom or the bride, and Art. 28 of Sch. II of Act IX of 1887 did not apply to such a case. No second appeal lay as the suit (being for the recovery of less than Rs. 500) was within the cognizance of the Small Cause Court. CHINNAYYA *v.* ACHAMMAH (1912).

I. L. R. 37 Mad. 538

PROVISIONAL APPOINTMENT.

See UNIVERSITY LECTURERSHIP.

I. L. R. 41 Calc. 518

PUBLIC DEMANDS RECOVERY ACT (BENG. I OF 1895).

——— **ss. 20, 21**—*Sale without notice to representatives of a deceased judgment-debtor, if a nullity—Failure of Collector to act under s. 21, though deposit duty made, if a ground for treating sale a nullity—Irregularity—Sale, voidable only—Proper remedy.* On 14th March 1898, a Court holding a sale under the Public Demands Recovery Act was apprised of the death on 10th March 1898 of one of the judgment-debtors but the property was

PUBLIC RECOVERY DEMANDS ACT (BENG. I OF 1895)—*concld.*

——— ss. 20, 21—*concld.*

nevertheless sold without notice to the legal representatives of the deceased judgment-debtor. In a suit by the purchaser brought more than a year after to recover the land: *Held*, that the legal representatives of the deceased judgment-debtor could not ask the sale to be treated as a nullity on this ground by way of defence in this suit. It was an irregularity which made the sale voidable by either a proceeding under s. 311 of Act XIV of 1882 or a suit brought within one year as contemplated by Art. 12 (*a*) of the Limitation Act of 1877. Nor could the sale be declared a nullity in such a suit upon proof only of improper rejection by the Collector of an application to set aside the sale, although the amounts mentioned in s. 21 of the Public Demands Recovery Act were duly deposited. BEPIN BEHARY BERA *v.* SASI BHUSHAN DATTA (1913). **18 C. W. N. 766**

PUBLIC DOCUMENT.

See EVIDENCE ACT (I OF 1872), S. 35.
I. L. R. 36 All. 161

PUBLIC GOOD.

See DEFAMATION.
I. L. R. 41 Calc. 514

PUBLIC PROSECUTOR.

See CONTEMPT OF COURT.
I. L. R. 41 Calc. 173

See SANCTION FOR PROSECUTION.
I. L. R. 41 Calc. 446

——— *Remembrancer—Practice and Procedure—Criminal Procedure Code (Act V of 1898), ss. 4 (t), 417, 492—Acquittal, appeal from—The Legal Remembrancer of Bengal, as Public Prosecutor for Bengal, incompetent to prefer an appeal from acquittal, for the Government of Bihar and Orissa.* By a notification published in the Calcutta Gazette on 24th June 1886, the Legal Remembrancer of Bengal was to be *ex officio* Public Prosecutor in all cases before the High Court on its Appellate Side except Calcutta cases. On 1st April 1912, the Government of Bihar and Orissa appointed Mr. Adami to be the Legal Remembrancer of that Province. Under instructions from the Government of Bihar and Orissa contained in their letter dated 23rd April 1913 (which did not appoint him Public Prosecutor for this case), the Legal Remembrancer of Bengal (through his Deputy) presented this appeal to the High Court on 2nd May 1913: *Held*, that, from 1st April 1912, the Legal Remembrancer of Bihar and Orissa became *ex officio* Public Prosecutor for that Province; and that the mere fact that a person had been directed to present an appeal to the High Court from an order of acquittal did not involve his appointment as Public Prosecutor for Bihar and Orissa for the purposes of the case; and that, accordingly, the appeal presented by the Deputy Legal Remembrancer of Bengal was incompetent. DEPUTY LEGAL REMEMBRANCER, BENGAL *v.* GAYA PROSAD (1913).
I. L. R. 41 Calc. 425

PUBLIC RELIGIOUS TRUST.

——— *Trespasser, suit for removal of—Civil Procedure Code (Act V of 1908), s. 92—Advocate-General, consent of.* A suit for the removal of a trespasser in possession of trust property is not a suit of the kind contemplated by s. 92 of the Code of Civil Procedure and, therefore, for the institution of such a suit no consent of the Advocate-General is necessary. *Budree Das Mukim* v. *Chooni Lall Johurry, I. L. R. 33 Calc. 789*, followed. *Neti Rama Jogiah* v. *Venkatacharulu, I. L. R. 26 Mad. 450, Sajedur Raja Chowdhuri* v. *Gour Mohan Dass Baishnav, I. L. R. 24 Calc. 418, Budh Singh Dudhuria* v. *Niradbaran Roy, 2 C. L. J. 431, Muhammad Abdul Majid Khan* v. *Ahmad Siad Khan, I. L. R. 35 All. 459*, referred to. AYATUNNESSA BIBI *v.* KULFU KHALIFA (1914).
I. L. R. 41 Calc. 749

PUBLIC SERVANT.

——— assaulting a, in execution of duty—
See RIOTING. **I. L. R. 41 Calc. 836**

PUBLIC STREETS.

See RAILWAYS ACT (IX OF 1890), S. 7.
I. L. R. 38 Bom. 565

PURCHASER FOR VALUE.

See VENDOR AND PURCHASER.
L. R. 41 I. A. 189

PUTNI.

See SALE. **I. L. R. 41 Calc. 148**

PUTNI LEASE.

See LANDLORD AND TENANT.
I. L. R. 41 Calc. 683

PUTNI REGULATION (VIII OF 1819).

See DEPOSIT IN COURT. **I. L. R. 41 Calc. 1000**

——— ss. 3, 5, 6—*Land Acquisition Act (I of 1894)—Non-registration of putnidar's name in zemindar's books—Effect of, on putnidar's title to share of compensation—Refusal of zemindar to allow proportionate abatement, effect of, on zemindar's title to compensation.* When the whole of the compensation money for land acquired under the Land Acquisition Act was awarded to the *putnidars* on the ground that as the zemindars had not allowed an abatement of rent on account of the land acquired, they were not entitled to a share of the compensation money and the zemindars' case was that as the *putnidars* did not get themselves registered in the books of the zemindars under the provisions of the Putni Regulation their title was not protected and they were not entitled to claim any portion of the compensation money: *Held*, that the *putnidars* were entitled to the compensation money and the zemindars to no portion of it. Under s. 6 of the Putni Regulation the landlord may demand a fee for the registration in his books of the name of the purchaser of a *putni* as also security from him but the omission to pay the fee and the security does not affect in any way the title of the purchaser whose rights are perfected upon the transfer by the *putnidar* and are not in any way contingent for their validity upon the payment of

PUTNI REGULATION (VIII OF 1819)—*concld.*

———— **ss. 3, 5, 6**—*concld.*

the fee and security. If the zemindars allow an abatement of rent to the *putnidars* the rent abated primarily represents their annual loss and they may reasonably claim out of the compensation money the capitalised value of that rent but if they do not allow such abatement they do not suffer any immediate loss by reason of the acquisition. GUNPAT SINGH *v.* MOTI CHAND (1912).
18 C. W. N. 103

———— **ss. 5, 6**—*Transferee of portion of putni, if may claim recognition by zemindar under Bengal Tenancy Act (VIII of 1885), ss. 12, 17—S. 195* (c). A partial transferee of a *putni* taluk is not entitled to be recognised by the zemindar. It is a form of transfer which under the terms of ss. 5 and 6 of Reg. VIII of 1819 the zemindar is not bound to recognise, and under s. 195(c) of the Bengal Tenancy Act the transferee cannot claim recognition by reason of ss. 12 and 17 of the latter Act. RAKHAL CHANDRA DAS *v.* UMAPADO MISRI (1913). **18 C. W. N. 629**

———— **s. 13**—*Sale of putni—Suit by vendor for back rents not assigned—Putni if may be sold free of darputni in execution of decree made—Deposit of rent by darputnidar.—Darputnidar's lien, priority of.* The special lien which a subordinate tenure-holder acquired under s. 13 of Reg. VIII of 1819 by depositing the *putni* rents in arrears for which the *putni* has been advertised for sale by the zemindar under that Regulation, is not affected by proceeding taken in respect of the *putni* under the Bengal Tenancy Act, the Putni Regulation being a self contained Act specially excluded from the operation of the Bengal Tenancy Act by s. 195 of that Act. FORBES *v.* MAHARAJ BAHADUR SINGH (1914).
18 C. W. N. 747
I. L. R. 41 Calc. 926

PUTNI RENT.

See DEPOSIT IN COURT.
I. L. R. 41 Calc. 1000

PUTNI TALUK, OWNER OF.

See LANDLORD AND TENANT.
I. L. R. 41 Calc. 683

PUTNIDAR.

See POOLBUNDI CHARGES.
I. L. R. 41 Calc. 130

———— **relinquishment by.**

See LANDLORD AND TENANT.
I. L. R. 41 Calc. 683

Q

QUARRY.

See LAND ACQUISITION ACT (I OF 1894).
I. L. R. 38 Bom. 37

R

RAILWAY COMPANY.

See CONTRIBUTORY NEGLIGENCE.
I. L. R. 41 Calc. 308

———— *Loss of goods—Risk-note, Form H—Consignment under Risk-note—Loss of portion of consignment—Onus of proving cause of loss—Railways Act (IX of 1890), s. 72.* Where a number of tins containing oil was consigned to the defendant railway company under risk-note, Form H, and the tins were delivered to the consignee, but the contents of some of the tins were missing: *Held*, that the person who said that the case fell within the exceptions mentioned in the risk-note, Form H, had to prove his assertion. *Sheobarut Ram* v. *Bengal North-Western Railway Company, 16 C. W. N. 766*, referred to. EAST INDIAN RAILWAY CO. *v.* NILKANTA ROY (1913). **I. L. R. 41 Calc. 576**

RAILWAY RECEIPT.

See CONTRACT ACT (IX OF 1872), SS. 4, 61
103. . . **I. L. R. 38 Bom. 255**

———— *Mercantile document—Title—Endorsee—Interest in the goods—Action for damages.* A railway receipt is a mercantile document of title and the endorsee of the receipt has sufficient interest in the goods covered by it to maintain an action against the Railway Company for damages in respect of the goods covered by the receipt. *Amerchand & Co.* v. *Ramdas Vithaldas, I. L. R. 38 Bom. 255*, followed. DOLATRAM DWARKADAS *v.* B. B. & C. I. RAILWAY COMPANY (1914). . . . . **I. L. R. 38 Bom. 659**

RAILWAYS ACT (IX OF 1890).

———— **s. 7**—*City of Bombay Municipal Act (Bombay Act III of 1888), ss. 289, 293—Public streets—Vesting of public streets in Municipality—Laying railway lines under statutory authority over such streets—Land Acquisition Act (I of 1894), s. 7—Proceedings under Land Acquisition Act unnecessary in case of such streets.* The Great Indian Peninsula Railway, in constructing a line of railway known as the Harbour Branch Railway in the Island of Bombay, laid down the lines of rails in a level-crossing across a public street known as Sewri-Koliwada Road, vested in the Municipal Corporation of Bombay under s. 289 of the City of Bombay Municipal Act, without permission granted by the Municipal Corporation. The Municipal Corporation sued to obtain a declaration that the Railway Company could not lawfully maintain their lines of railway across the street in question without either obtaining permission granted by the Corporation and confirmed by the Government under s. 293 of the City of Bombay Municipal Act, or acquiring the land required for the level-crossing under the land Acquisition Act, 1894. *Held*, that the statutory authority under s. 7 of the Indian Railways Act was established and that the application of s. 293 of the City of Bombay Municipal Act was excluded by the words "notwithstanding anything in any

RAILWAYS ACT (IX OF 1890)—*concld.*

——— **s. 7**—*concld.*

other enactment for the time being in force" in the first-mentioned section. *Held*, further, that where a railway company wished to lay a line of railway upon and across a street, it was neither necessary nor appropriate to proceed under the Land Acquisition Act for the acquisition of the land, because if the Government under s. 7 of the Act were to direct the Collector to take order for the acquisition of the land he would make his award and take possession and the land would then vest absolutely in Government for the railway company free from incumbrances and would then cease to be a portion of the street, and the railway company would be unable to exercise the power given to it of constructing the railways upon and across the "street." *Held*, further, that the effect of s. 289 of the City of Bombay Municipal Act vesting all public streets, pavements, stones and other materials in the Corporation and under the control of the Commissioner, was only to vest in that body such property as was necessary for the control, protection and maintenance of the street as a highway for public use. G. I. P. RAILWAY COMPANY *v.* MUNICIPAL CORPORATION OF THE CITY OF BOMBAY (1913). **I. L. R. 38 Bom. 565**

——— **s. 72.**

See RAILWAY COMPANY.
I. L. R. 41 Calc. 576

RATE CIRCULAR.

——— **issued by shipowners—**

See CONTRACT. . **I. L. R. 41 Calc. 670**

RECEIPT.

——— **for goods shipped—**

See CONTRACT. . **I. L. R. 41 Calc. 670**

RECEIVER.

See CIVIL PROCEDURE CODE (1908), O. XL, R. 1. . **I. L. R. 36 All. 19**

1. ——— *Suit by present against former Receivers, whether maintainable.* A suit was instituted by the present receivers of an estate against the fromer receivers (before the accounts of the latter have been passed by the Court) for the recovery of a certain sum which the plaintiffs alleged the defendants had failed to realise on behalf of the estate: *Held*, that no such suit was maintainable. K. B. DUTT *v.* SHAMAL DHONE DUTT (1913).
I. L. R. 41 Calc. 92

2. ——— *Appointment of—Partition suit—Defendant in sole occupation, though plaintiff not altogether excluded—Court, if may appointment a Receiver and when—Party to a suit when may be appointed.* The Court has jurisdiction to appoint a Receiver until the hearing of a partition action or until further orders, even though there is no exclusive occupation by any party, and the Court will not hesitate to do so whenever it is just and convenient. The case for the appointment of a Receiver is much stronger if a party to the partition action is in sole occupation. In such a case any other party may obtain a Receiver either of his share of the rents and profits or of the whole estate. The Court may also allow the party in exclusive occupation to elect to pay to the others an occupation rent, or the Court may require security from the co-owner in exclusive occupation to account for their share of the rents to the other co-owners. *Held*, that in the circumstances of the present case the second of the four alternative courses, *viz.*, appointment of a Receiver of the whole estate was the proper one to adopt. One of the parties to a litigation should not ordinarily be appointed a Receiver except in very exceptional circumstances. In the special circumstances of this case, the defendant in possession was appointed Receiver of the whole estate subject to conditions. SUPRASANNA ROY *v.* UPENDRA NARAIN ROY (1913).
18 C. W. N. 533

3. ——— *Appointment of—Property in possession of defendant, it may be taken over—Object of appointment.* Where the plaintiff sued to recover property in the possession of his adoptive mother and the suit was resisted, *inter alia*, on the ground that the defendant was entitled to retain possession of the estate for her life: *Held*, that O. XL, r. 1 (*2*), which clearly refers to a case of removal of property from the possession or custody of a person other than the parties to the suit, was no bar to the appointment of a Receiver on the application of plaintiff when it was established that the estate was being grossly mismanaged by the defendant. The effect of the appointment of a Receiver would not be to prejudge the case in any way, as the only object and effect of so doing would be to maintain the estate in its present condition during the pendency of the suit. SATYA NARAIN SINGH *v.* KESHABATI KUMARI (1913).
18 C. W. N. 537

4. ——— *Receiver authorised to sue and defend—Suit by one against the other, if maintainable—Objection to suit, when to be taken—Contempt of Court.* A Receiver is an officer of the Court and the possession by him is the possession of the Court, and to bring a suit so as to interfere with the possession of the Court without the leave of the Court, is a contempt of Court. But if a party is guilty of contempt of Court the proper way for the Receiver to act is to bring it immediately to the notice of the Court so that proper steps may be taken against the party guilty of contempt; and, in a proper case the Court would grant a party leave to proceed with the suit. But it is not proper for the Receiver to wait till the day of hearing and put this objection forward as a ground for dismissing the suit. Where by consent, in a partition suit two of the parties were made Receivers of different portions of the property with full powers under s. 503 of Act XIV of 1882: *Held*, that each of the Receivers had power to bring and defend suits, and a suit by one against the other without leave specially obtained

RECEIVER—*concld.*

from Court did not amount to such a grave and serious contempt of Court by the plaintiff as to merit dismissal. *Pramathanath* v. *Khetranath, I. L. R. 32 Calc. 270 : s. c. 9 C. W. N. 247*, referred to. SATYA KRIPAL BANERJEE *v.* SATYA BHUPAL BANERJEE (1913). . . . **18 C. W. N. 546**

RECONVEYANCE DOCUMENT.

See REGISTRATION ACT (III OF 1877) S. 17, CLS. (*a*), (*b*) AND (*h*).
I. L. R. 38 Bom. 703

REDEMPTION.

See LIMITATION ACT (XV OF 1877) SCH. II, ART. 148. **I. L. R. 36 All. 195**

See MORTGAGE.
I. L. R. 36 All. 36, 551

——— **suit for—**

See CIVIL PROCEDURE CODE (1908), SS. 2, 97, O. XXVI, RR. 11, 12 (2).
I. L. R. 38 Bom. 392

——— **suit for—**

See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), SS. 2 (2) 10A.
I. L. R. 38 Bom. 18

REFERENCE TO HIGH COURT.

See CRIMINAL TRESPASS.
I. L. R. 41 Calc. 662

See VERDICT OF JURY.
I. L. R. 41 Calc. 621

——— **grounds of—**

See VERDICT OF JURY.
I. L. R. 41 Calc. 621

REFUND OF PURCHASE-MONEY.

——— **suit for—**

See EXECUTION OF DECREE.
I. L. R. 36 All. 529

REFUSAL BY JUDGE.

——— **effect of—**

See CROSS-EXAMINATION.
I. L. R. 41 Calc. 299.

REGISTERED BOND.

See LIMITATION ACT (IX OF 1908), S. 19, SCH. I., ARTS. 116 AND 66.
I. L. R. 38 Bom. 177

REGISTRATION.

See REGISTRATION ACT.

See REGISTRATION ACT (XVI OF 1908), SS. 17, 90. . **I. L. R. 36. All. 176**

See TRANSFER OF PROPERTY ACT (IV of 1882), S. 59. . **I. L. R. 38 Bom. 372**

——— **of transfer of shares—**

See COMPANY. . **I. L. R. 36 All. 365**

REGISTRATION—*concld.*

——— **want of—**

See CONSTRUCTION OF DOCUMENT.
I. L. R. 37 Mad. 480

——— *Instrument reserving at life-estate to the maker, not a will—Instrument creating interest in adoptive mother—Value of the interest in excess of Rs. 100—Registration.* Any instrument which confers or reserves a life-estate to the maker is not a will. A deed of adoption by which an interest is reserved to the wife of the adopter in immoveable property which she otherwise would not have possessed and could not have possessed when such interest exceeds in value Rs. 100, requires registration. PIRSAB valad KASIMSAB *v.* GURAPPA BASAPPA (1913). . . **I. L. R. 38 Bom. 227**

REGISTRATION ACT (III OF 1877).

——— **s. 17, cls. (*a*), (*b*) and (*h*)**—*Registration Act (XVI of 1908), s. 17, excep.* (v)—*Registered conveyance—Simultaneous unregistered document to reconvey—An ordinary agreement to sell—Exemption from registration.* The plaintiff and the defendant agreed that plaintiff should nominally sell the property in suit out and out to the defendant and thereafter to attorn to him for an amount of rent which would represent reasonable interest. A conveyance to this effect was executed and duly registered. Contemporaneously the defendant executed an agreement to the plaintiff to re-convey the property for the same consideration, namely Rs. 1,499, when called upon to do so. This agreement was not registered. The plaintiff having brought a suit against the defendant for the specific performance of the unregistered agreement to re-convey, the lower Courts dismissed the suit on the ground that the agreement was compulsorily registrable under s. 17, cls. (*a*) and (*b*), of the Registration Act (III of 1877). On second appeal by the plaintiff : *Held*, reversing the decree, that the agreement did not require registration. Separated entirely from the defendant's registered conveyance, plaintiff's unregistered document was nothing more than an ordinary agreement to sell and such agreements were expressly exempted from the operation of s. 17, clauses (*a*) and (*b*) of the Registration Act (III of 1877) by clause (*h*) and of s. 17 of the Registration Act (XVI of 1908) by exception (v). Having regard to the form of the document as a whole, it was no more than an ordinary agreement to re-convey. SAYAD MIR GAZI *v.* MIYA ALI (1914).
I. L. R. 38 Bom. 703

——— **s. 17, cls. (*d*), (*h*)**—*Amalnamah, if must be registered when lease intended to be granted a lease in perpetuity—Agreement to lease, which contemplated execution of patta and kabuliyat, but nevertheless intended passing title upon delivery of possession, if a document merely creating a right to obtain a subsequent document.* Where a document described the land intended to be demised and set out the boundaries thereof and proceeded to say that "according to your prayer I grant this *amalnamah* to you for erecting houses after reclaiming the said homestead, you will dwell thereon on pay-

REGISTRATION ACT (III OF 1877)—*contd.*

——— **s. 17**—*contd.*

ment of rent Rs. 15-1-0 gds. from year to year to our Sarkar ; you will abide the survey and settlement ; within a month on executing a *kabuliyat* you will take a *patta* which I shall grant:" *Held*, that the document was plainly an agreement to lease and the lease being apparently a lease in perpetuity the document was compulsorily registrable. *Syed Sufdar Reza* v. *Amzad Ali, I. L. R. 7 Calc. 703*, followed ; *Dwarka Nath* v. *Ledu Sikdar, I. L. R. 33 Calc. 502*, distinguished. That it was not a document merely creating a right to obtain a subsequent document within cl. (*h*) of s. 17 of the Registration Act as the parties intended that as soon as possession was taken under the document, the title of the grantee would commence and it was not contended that the title of the grantee did not yet commence by reason of his failure to tender a *kabuliyat* to the landlord and obtain from him a *patta*. *Narayanan Chetty* v. *Muthiah Sirvae, I. L. R. 35 Mad. 63, Champakalatika Mitra* v. *Nafar Chandra Pal, 15 C. W. N. 536*, referred to. ELAHI *v.* HUKUM (1913). **18 C. W. N. 38**

——— **s. 17, cl.** (*e*)—*Stamp Act (II of 1899), Sch. I, Art. 22—Trusts Act (II of 1882), s. 5—"Composition deed"—Compounding of debts due—Transfer of immoveable property—Registration not necessary.* With the consent of creditors to the extent of Rs. 1,22,000 out of the total number of creditors claiming Rs. 1,61,800 of the family firm represented by one B, the latter executed a deed making over all the specified assets of the family to certain nominated trustees. The creditors coming in (by a particular day) under the deed agreed that after all the goods and the properties had been made over to the trustees no other claim whatever with regard to the amounts due to them should remain outstanding against B and the minor members of the family, but the whole claim should be understood to be written off against them, and B and the minors were to make use of the deed as a release passed on their behalf. The deed also provided that the trustees were to manage the properties for the benefit of the creditors interested and the monies realized from time to time were to be distributed among such creditors, in proportion to their claims. The properties comprised in the deed, moveable as well as immoveable, were transferred to the trustees in due course. The deed was unregistered. Subsequently in a suit brought by the trustees to recover possession of a house comprised in the deed, a question having arisen whether the deed was a composition deed : *Held*, that the definition of the term "composition deed" as given in Art. 22, Sch. I of the Stamp Act (II of 1899), meant the same thing as the term "composition deed" in s. 17 of the Registration Act (III of 1877), that the term so defined covered three classes of instruments : (i) An assignment for the benefit of creditors. (ii) an agreement whereby payment of a composition or dividend was secured to the creditors and (iii) an inspectorship deed for the purpose of working the debtor's business for the benefit of his creditors, that the inclusion of

REGISTRATION ACT (III OF 1877)—*contd.*

——— **s. 17**—*concld.*

the term "composition deed," in s. 17 of the Registration Act (III of 1877) showed that it was intended to apply to a transfer of immoveable property and not to a mere agreement to take fractional payment of money in settlement of claims, that the test of a "composition deed" was that there ought to be a compounding of debts due and that such a deed fell under cl. (*e*) of s. 17 of the Registration Act (III of 1877) and did not require registration under that Act nor under the provisions of s. 5 of the Trusts Act (II of 1882). *Held*, accordingly, that the deed in question was a composition deed within the meaning of s. 17, cl. 2, of the Registration Act (III of 1877), and did not require registration. CHANDRASHANKAR *v.* BAI MAGAN (1914). . . **I. L. R. 38 Bom. 576**

——— **ss. 28, 30** (*b*), **49.**

See REGISTRATION.

I. L. R. 41 Calc. 972

——— *Property comprised in mortgage, non-existence of—Onus of proof—Effect of registration by officer not having jurisdiction—Mortgagee, title of—Amendment of Schedule to mortgage deed—Property substituted not belonging to mortgagor—Fictitious entry in Schedule to get deed registered in Calcutta—Concurrent findings of fact as to mistake in entries in Schedule—No evidence showing mistake.* The plaintiff's (appellants') claim was based on a mortgage decree passed in a suit brought in the High Court at Calcutta on its Original Side to enforce a mortgage executed in the plaintiff's favour. The defendants (respondents) were the mortgagor (who did not appear) and two other persons who disputed the mortgagee's title. These defendants (who had not been parties to the suit on the mortgage) alleged that the mortgage deed had not been legally registered, because no portion of the property mortgaged was situated in Calcutta where the deed had been registered, and the decree had therefore been made by a Court which had no jurisdiction to entertain a suit on the mortgage, and the plaintiff had no title to maintain the suit. The only portion of the property in the mortgage deed alleged in the suit on the mortgage to be situate in Calcutta, was parcel No. 28 in the Schedule, and was described as "25 Guru Das Street" ; but the property so described was found to be non-existent, the wrong description being said to be due to a mistake though no evidence of it was given. The Court directed an amendment, and the description was altered to "25, Ashutosh Dey's Lane" which was in Calcutta, and was comprised within the same boundaries as those given in parcel 28 of the Schedule to the mortgage deed. In the present suit no evidence was given either by the mortgagor or the mortgagee to show that there had been any mistake in the description of the property ; but it was proved by the defendants that the property contained within the boundaries given in parcel 28 was property which did not belong and never had belonged to the mortgagor. Both the Courts below, like the High Court in the

REGISTRATION ACT (III OF 1877)—*contd.*

——— s. 28—*concld.*

suit on the mortgage, found without any evidence that there had been a mistake in the entry of parcel 28, and held that part of the property being in Calcutta the deed had been properly registered there, and that the decree in the mortgage suit had been rightly made, and with jurisdiction. *Held* (reversing those decisions), that it was open to the defendants (not having been parties to the mortgage suit) to contest the validity of the decree, and for the same reason the direction of the High Court that the entry in the Schedule should be amended did not affect them; and that under the circumstances of the case the onus was on the plaintiff to show that the entry in that parcel was not a fictitious entry, which onus he had not discharged. And their Lordships on the conduct of the parties and the evidence in the case, held that that parcel was in fact a fictitious entry and represented no property that the mortgagor possessed or intended to mortgage, or that the mortgagee intended to form part of his security. Such an entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged in fact existed, was a fraud on the Registration law, and no registration obtained by means thereof was valid. No such fictitious entry inserted to give a colourable appearance to the deed of relating to property in Calcutta when in reality such was not the case, could bring the deed within the limited jurisdiction of the Court. The High Court, therefore, had no jurisdiction to make the decree; and the deed not having been registered in accordance with the Registration Act (III of 1877), the mortgagee had no title to maintain the suit. The principle of concurrent findings of fact does not apply to a case of no evidence; according to well-known principles of law a decision that there is no evidence to support a finding being a question of law. Where, therefore, the Subordinate Judge found that the erroneous entry in the Schedule had been made by mistake, and the High Court accepted that finding, but there was no evidence to show that there was in fact any mistake in the matter. *Held*, that the finding was one which could be set aside by the Judicial Committee on appeal without departing from their practice of not interfering with concurrent findings of fact. HARENDRA LAL ROY CHOWDHURI *v.* HARIDASI DEBI (1914). . **I. L. R. 41 Calc. 972**

——— s. 50—*Registered document relating to land, effect of, as against unregistered document—Notice of title created by prior unregistered document, effect of, on holder of registered document—Burden of proof as to such notice—Possession of person other than vendor, if sufficient notice to put purchaser on enquiry—Effect of purchase with such notice.* S. 50 of the Indian Registration Act has no application when the person who claims title under the subsequent registered document has notice of the title created by the prior unregistered document. The burden lies upon the person who alleges such knowledge or notice to aver it in his

REGISTRATION ACT (III OF 1877)—*concld.*

——— s. 50—*concld.*

pleadings and to establish it. If a person purchases and takes a conveyance of an estate which he knows to be in the occupation of a person other than the vendor he is bound by all the equities which the person in such possession may have in the land. MAGOO BRAHMA *v.* BALKRISHNA DAS (1913.) . . . . **18 C. W. N. 657**

REGISTRATION ACT (XVI OF 1908).

——— ss. 17, 90—

——— Registration—Transfer of Property Act (IV of 1882), s. 107—Crown Grants Act (XV of 1895), ss. 2 and 3—Lease—Lease of Government land by commissioners of a notified area. The commissioners of a notified area let certain plots of land which were the property of the Government and had been handed over to them for administrative purposes. The leases ran in the name of the Secretary of State for India and provided that the lessees were to remain in possession for 30 years so long as they fulfilled certain conditions, and the lessor had a right of re-entry only on breach of certain conditions. *Held*, that such leases were compulsorily registrable, and could not be considered as falling within the purview of s. 90(*d*) of the Indian Registration Act, 1908, nor were they excluded from s. 107 of the Transfer of Property Act by the operation of the Crown Grants Act, 1895. *Dost Muhammad Khan* v. *the Bank of Upper India, 3 All. L. J. 129, 628*, referred to. MUNSHI LAL *v.* THE NOTIFIED AREA OF BARAUT (1914). . **I. L. R. 36 All. 176**

——— s. 17, cl. (*d*)—

See HINDU LAW—WIDOW.
I. L. R. 38 Bom. 224

——— s. 17, excep. (v)—

See REGISTRATION ACT (III OF 1877): S. 17, CLS. (*a*), (*b*) AND (*h*).
I. L. R. 38 Bom. 703

——— s. 83.

See CRIMINAL PROCEDURE CODE, S. 213.
I. L. R. 38 Bom. 114

REGISTRY OF VESSELS.

See COASTING-VESSELS ACT, SS. 4, 7, 13.
I. L. R. 38 Bom. 111

REGULATION II OF 1819.

——— Resumption of lands within permanently settled mahal—Nature of onus of proof on person with whom such land settled in dispute as to whether land settled was within ambit of the zemindari. Where certain lands within a permanently settled mahal were resumed under R. II of 1819 and settled along with other Government Khas Mahal lands with a person other than the zemindar, the onus of proving that lands within the ambit of the zemindari were part of such resumed land as against the zemindar did not lie

REGULATION II OF 1819—*concld.*

on the person who claimed it as such in the sense that on his failure to discharge it, the lands must be taken to remain and be vested in the zemindar. SURJA KANTA ACHARJYA *v.* SARAT CHANDRA ROY CHOWDHURY (1914). . . **18 C. W. N. 1281**

RELEASE

———— **conditional—**

See CONTRACT ACT (IX OF 1872), S. 28.
I. L. R. 38 Bom. 344

RELIGIOUS ENDOWMENTS ACT (XX OF 1863)

———— **s. 18.**

See CIVIL PROCEDURE CODE (ACT V OF 1908), S. 92. **I. L. R. 37 Mad. 184**

RELIGIOUS TRUST.

See PUBLIC RELIGIOUS TRUST.

RELINQUISHMENT.

———— **by patnidar—**

See LANDLORD AND TENANT.
I. L. R. 41 Calc. 683

REMAND.

See CRIMINAL PROCEDURE CODE, SS. 112, 167. . . . **I. L. R. 36 All. 262**

———— *Civil Procedure Code (Act V of 1908), ss. 99, 107 (1) (b), O. XLI, r. 23—Appellate Court, power of—Whether power wider than under former Code (Act XIV of 1882), ss. 562, 564—Statute composed of Sections and Rules—Canon of interpretation.* An Appellate Court has no wider powers of remand under s. 107 of the Civil Procedure Code of 1908, read with O. XLI, r. 23, than it had under ss. 562 and 564 of the Civil Procedure Code of 1882. *Zohra Bibi* v. *Zobeda Khatun, 12 C. L. J. 368*, dissented from. When an Act is divided into sections and rules, the proper canon of interpretation is that the sections lay down general principles and the rules provide the means by which they are to be applied, and they cannot be otherwise applied. An order of remand improperly made is an irregularity within the meaning of s. 99 of the Civil Procedure Code, 1908, *Mohesh Chandra Dass* v. *Jamiruddin Mollah, I. L. R. 28 Calc. 324*, followed. NABIN CHANDRA TRIPATI *v.* PRANKRISHNA DE (1913) . **I. L. R. 41 Calc. 108**

REMUNERATION.

See ADMINISTRATOR PENDENTE LITE.
I. L. R. 41 Calc. 771

RENT.

See LANDLORD AND TENANT—RENT.

———— **abatement of—**

See PATNI LEASE.
I. L. R. 41 Calc. 683

———— **liability for—**

See SALE. . **I. L. R. 41 Calc. 148**

RENT—*concld.*

———— **no estoppel by receipt of—**

See MADRAS ESTATES LAND ACT (MAD. I OF 1908). . **I. L. R. 37 Mad. 1**

———— *Oral evidence, admissibility of—Evidence Act (I of 1872), s. 92—Tenancy—Lease.* Where a *kabuliyat* was executed, but was not registered and never came into operation, oral evidence is admissible to prove the rent agreed upon by the parties. A tenancy can be proved without proving the lease, if there be any. *Banka Behary Christian* v. *Raj Chandra Pal, 14 C. W. N. 141*, and *De Medina* v. *Polson, Holt N. P. 47*, referred to. AMEER ALI *v.* YAKUB ALI KHAN (1913). . . . **I. L. R. 41 Calc. 347**

RENT-FREE HOLDING.

———— ———— *Lakhiraj Land, accretions to—Lakhirajdar if entitled to hold same rent-free—Suit to recover possession from superior tenure-holder and raiyat who took settlement from latter—Mesne profits—Regulation XI of 1825, s. 4, sub-ss. (1) and (5).* The holder of a rent-free holding is entitled to possession of all lands forming accretions thereto, but he is not entitled to hold the same rent-free. *Mea Jan* v. *Akram, 8 C. L. J. 541, Gourhari* v. *Bholanath, I. L. R. 21 Calc. 233, Golam Ali* v. *Kali Krishna Thakur, I. L. R. 7 Calc. 479, Chooramonee Dey* v. *Howrah Mill Company, I. L. R. 11 Calc. 696, Rammonee* v. *Oomesh Chunder [1858] Beng. S. D. A. 1836*, and *Ramqutty Nag* v. *Buroda Churn, 1 W. R. 124*, referred to. Where such a person sued to recover the accreted land from the holder of the superior interest and from a raiyat who in good faith had taken settlement of the land from the latter: *Held*, that the plaintiff was not entitled to eject the raiyat. The principle of *Benode Lal Pakrashi* v. *Kalu Pramanik, I. L. R. 20 Calc. 708*, applies equally to firm and alluvial lands. As against the superior holder, the plaintiff who, it was found, had never paid him any rent or offered to do so was not given a decree for mesne profits, the former's claim for rent being set off against the latter's claim of mesne profits. BAIDYA NATH ROY *v.* NANDA LAL GUHA SARKAR (1914). . . . . **18 C. W. N. 1206**

RESIDENCE.

See DIVORCE ACT, (IV OF 1869), SS. 2, 4, 7, 45. . **I. L. R. 38 Bom. 125**

RES JUDICATA.

See CIVIL PROCEDURE CODE (1908), S. 11.
I. L. R. 36 All. 424, 446

See CIVIL PROCEDURE CODE (1908), S. 11.
I. L. R. 38 Bom. 309, 438

See CIVIL PROCEDURE CODE (1908), O. II, R. 2; O. XXXIV. R. 14.
I. L. R. 36 All. 264

See FRAUD. . **I. L. R. 41 Calc. 990**

See HINDU LAW—PARTITION.
L. R. 41 I. A. 247

RES JUDICATA—*contd.*

See INAM LANDS.

I. L. R. 38 Bom. 272

1. ——— *Estoppel—Mortgage by Hindu widow claiming an absolute estate—Reversioner previous independent title of.* On 28th August 1879, one Musammat Bhamo was declared to have preferential title to one Satyabadi in certain lands. On the 30th September 1904, Bhamo executed a conditional mortgage. In a suit for foreclosure brought by the mortgagee against Bhamo and Satyabadi's brother Baleshwar who was made a party on the allegation that he was in possession as a donee of the equity of redemption, a decree *nisi* was granted to the mortgagee, and Baleshwar (who repudiated the title of Bhamo and set up a title in himself alleging that the property belonged to him, and Bhamo was in possession as his guardian) was dismissed from the suit. Subsequently, the mortgage decree having been made absolute, and the mortgagee having been unable to obtain possession of the lands in question, a suit for recovery of possession was filed on the 19th June 1906, by the mortgagee against Baleshwar. This latter suit was decreed on the 17th September 1906, and both Courts of Appeal subsequently confirmed this decree. Shortly after the decision of the High Court in the above appeal, Bhamo died, and, on the 2nd April 1909, Baleshwar brought a suit against the mortgagee for declaration of title and recovery of possession. *Held*, that the decision in the litigation of 1879 could not operate as *res judicata*. *Baleshwar Bagarti* v. *Bhagirathi Das*, *I. L. R. 35 Calc. 701*, followed. *Held*, also, that the decision in the mortgage suit could not operate as *res judicata*. *Jaggeshwar Dutt* v. *Bhuban Mohan Mitra*, *I. L. R. 33 Calc. 425 ; 3 C. L. J. 205*, referred to. *Held*, further, that the plaintiff was bound by his allegations in the suit for recovery of possession and could not now be permitted to say that Bhamo was in possession as a Hindu mother and that he himself was entitled to succeed on her death. *Bhaja Chowdhury* v. *Chuni Lal Marwari*, *5 C. L. J. 95*, referred to. BHAGIRATHI DAS *v.* BALESHWAR BAGARTI (1913). . . **I. L. R. 41 Calc. 69**

2. ——— *Suit for rent decreed—Tenant, if can institute title-suit to declare he was the tenant of another person and for recovery of amount realised under the decree—Alleged landlord joined as party.* Where B having sued C for rent on the basis of a registered *kabuliyat*, C denied his tenancy under B and asserted that he was holding as tenant directly, under B's superior landlord A, but C's defence was overruled and a decree made in B's favour : *Held*, that a subsequent suit brought by C in which he made both A and B parties defendants for a declaration that he was not C's tenant and for refund of the money realised by B under his decree was barred by *res judicata*. *Dwarka Nath* v. *Ram Chand*, *I. L. R. 26 Calc. 428 ; s. c. 3 C. W. N. 266*, distinguished. SREENATH DUTT *v.* KASER SHEIKH (1913). **18. C. W. N. 116**

3. ——— *Execution proceedings—Order, returning execution application for correction of the amount claimed, without notice to judgment-debtor, whether binding on the decree-holder.* Where the Court without issuing notice to the judgment-debtor returned an execution application, directing the decree-holder to amend the same by reducing the amount claimed, and the decree-holder failed to appeal against the order : *Held*, that the order was a judicial adjudication in a proceeding between the parties, that the decree-holder was not entitled to the larger amount, and that the decree-holder was consequently debarred from claiming the larger amount in a fresh execution application. The fact that the judgment-debtor had no notice is immaterial, except when the order is passed against him, in which case it is an *ex parte* order, and cannot bind a party who had no opportunity to make his defence. *Hiralal Bose* v. *Dwija Charan Bose*, *3 C. L. J. 240*, *Bhola Nath Das* v. *Prafulla Nath Kundu Chowdhry*, *I. L. R. 28 Calc. 122*, and *Delhi and London Bank, Limited* v. *Orchard*, *I. L. R. 3 Calc. 47*, distinguished. VYAPURI GOUNDAN *v.* CHIDAMBARA MUDALIAR (1912). . **I. L. R. 37 Mad. 31**

RES JUDICATA—*concld.*

RESIDUARY LEGATEE.

——— *Limitation—Accounts, how far residuary legatee can claim—Limitation Act (IX of 1908), Sch. I, Art. 123.* A residuary legatee is entitled to such an account as is necessary for the purpose of ascertaining what the residuary share is, to which he became entitled under the will. A suit by a residuary legatee to recover his legacy is governed by Art. 123 of the Limitation Act, 1908, and is within time if it is instituted within 12 years from the time when the share became payable. *Bissell* v. *Axtell*, *2 Vern. 47*, *Khitish Chandra Acharya Chowdhury* v. *Osmond Beeby*, *I. L. R. 39 Calc. 587*, referred to. KHETRAMANI DASEE *v.* DHIRENDRA NATH ROY (1913).

I. L. R. 41 Calc. 271

RESISTANCE.

See SEARCH BY POLICE OFFICERS.

I. L. R. 41 Calc. 261

RESTITUTION OF CONJUGAL RIGHTS.

See DIVORCE ACT (IV OF 1869), SS. 2, 4, 7, 45. . . **I. L. R. 38 Bom. 125**

RETRIAL.

See AUTREFOIS ACQUIT.

I. L. R. 41 Calc. 1072

REVENUE COURT.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), S. 195, CLS. (*b*) AND (*c*).

I. L. R. 38 Bom. 642

REVENUE-FREE LAND.

See UNITED PROV. LAND REVENUE ACT (III OF 1901), S. 32(*d*).

I. L. R. 36 All. 231

REVENUE SALE.

See REVENUE SALE LAW.

See SALE FOR ARREARS OF REVENUE.

——————— *Revenue Sale Law (Act XI of 1859), ss. 6, 33—Publication of notification sale in the Vernacular Government Gazette, if necessary—Omission thereof is an irregularity and not illegality—Bengal Land Revenue Sales Act (Beng. VII of 1868), s. 8.* Where the Subordinate Judge of Cuttack decided that it was absolutely necessary that the notification of a Revenue Sale should be published in the Vernacular Gazette *in Uriya*, and that its non-publication had made the sale null and void apart from any consideration as to inadequacy of price: *Held*, that the publication of a notification of sale in the *Calcutta Gazette* only was sufficient compliance with a provision of Law (Act XI of 1859, s. 6) requiring the publication of such notification in the "Official Gazette." *Held*, further, that even if it had been necessary to publish the notification in the *Uriya Gazette* the omission to do so would not have rendered the sale null and void in the absence of any proof of substantial injury by reason of this omission, as s. 33 of Act XI of 1859 applied to such a case. *Gobind Lall Roy* v. *Ramjanam Misser, I. L. R. 21 Calc. 70; L. R. 20 I. A. 165*, followed. *Lala Mobaruk Lall* v. *Secretary of State for India, I. L. R. 11 Calc. 200*, referred to. RADHA CHARAN DAS *v.* SHARFUDDIN HOSSEIN (1913). . . **I. L. R. 41 Calc. 276**

REVENUE SALE LAW (ACT XI OF 1859).

——————— **ss. 6, 33.**

See REVENUE SALE.

I. L. R. 41 Calc. 276

——————— **s. 13**—*Share sold for its own arrears though estate as a whole not in arrears—Validity of sale—"Estate," meaning of.* Where the plaintiff's share in a revenue-paying estate in respect of which a separate account had been opened was sold for its own exclusive arrears, without taking into account excess payments made by the proprietors of other shares and which more than made good the arrears due on plaintiff's share: *Held*, that as the estate as a whole was not in arrears the sale of plaintiff's share was illegal and was liable to be set aside by the Civil Court. The term "estate" as used in the clause "if the estate shall become liable to sale for arrears of revenue" in s. 13 of Act XI of 1859, means the entire estate out of which the separate share has been carved. INDRA MANI DASYA *v.* PRIYANATH CHACKRABARTY (1913). . . **18 C. W. N. 490**

——————— **ss. 13, 14, 33, 53.**

See SALE FOR ARREARS OF REVENUE.

I. L. R. 41 Calc. 1092

——————— **ss. 14, 33**—*Separated share not fetching enough to pay arrears—Several co-sharers making deposits within time allowed, who is purchaser—Sale, how attacked.* When on a share of a revenue-paying estate, in respect of which a separate account has been opened, being put up for sale, the highest offer does not equal the amount due thereon, and the Collector stops the sale and declares that the entire estate will be put up to sale for arrears, unless the other recorded sharer or sharers or one or more of them shall within 10 days purchase the share in arrears by paying to Government the whole arrear due from the share, and more than one such recorded co-sharer separately make the necessary payment within the time specified, the Collector must recognize as purchaser the depositor who first pays the whole amount, or if there are more depositors than one to recognize as joint purchasers those whose payments first amount to the total arrears due. S. 33 of Act XI of 1859 applies to sales under s. 14, and when the first payer has been declared by the Collector to be the purchaser, a co-sharer who has paid up the arrears subsequently cannot have the sale set aside by suit in the Civil Court except upon proof of the circumstances specified in s. 33. Such a sale under s. 14 cannot be attacked as a nullity and as such not requiring proof of those circumstances. *Chooturbhuj Dutt* v. *Ishri Mul, I. L. R. 21 Calc. 884, Gobindlal Ray* v. *Ramjanam Misser, I. L. R. 21 Calc. 70*, followed. *Quære*: Whether the s. 14 of Act XI of 1859 precludes sharers of the share exposed for sale from purchasing the defaulting share. SAMBHO KUOR *v.* HARIHAR PERSHAD (1914). . **18 C. W. N. 1071**

REVENUE SALE LAW (ACT XI OF 1859)—*concld.*

——————— **ss. 14, 33**—*concld.*

——————— **s. 37**—*Registered putnidar purchasing estate at revenue sale, if may annul subordinate tenures.* The plaintiff, who was the owner of a *putni* which was specially registered and so protected at a sale for arrears of revenue, purchased the parent estate at a sale for arrears and sought to annul the tenures subordinate to the *putni*: *Held*, that the plaintiff was not entitled to annul the tenures subordinate to the *putni*. SATCOWRI CHATTERJEE *v.* PRIYANATH BASU (1913).

18 C. W. N. 672

REVERSIONER.

See HINDU LAW—ALIENATION.

I. L. R. 41 Calc. 793

——————— **suit by, to set aside alienation by widow—**

See ABATEMENT OF SUIT.

I. L. R. 37 Mad. 406

——————— **title of—**

See RES JUDICATA.

I. L. R. 41 Calc. 69

REVIEW.

See APPEAL TO PRIVY COUNCIL.

I. L. R. 41 Calc. 734

See JURISDICTION.

I. L. R. 38 Bom. 416

1. ——————— *Appeal against order granting review of judgment—Civil Procedure Code (Act V of 1908), O. XLIII, r. 1, cl. (w), and O. XLVII, r. 7.* O. XLIII, r. 1, cl. (*w*), must be read with, and subject to, r. 7, O. XLVII. An

REVIEW—*concld.*

order granting application for review of judgment can only be objected to on grounds specified in r. 7 of O. XLVII. *Jugernath Pershad Singh* v. *Ram Autar Singh, Mis. A. No. 341 of 1909 (unrep.), Tripura Charan Kal* v. *Sorashi Bala, C. R. No. 123 of 1913 (unrep.), Surendra Nath Talukdar* v. *Sita Nath Das Gupta, Mis. A. No. 188 of 1912 (unrep).* referred to. HARI CHARAN SAHA *v.* BARAN KHAN (1914). . . . . **I. L. R. 41 Calc. 746**

2. ——— *Dismissal of application for admission of second appeal—Application for review based on alleged discovery of new and important evidence—High Court, Jurisdiction of—Civil Procedure Code (Act V of 1908), O. XLI, r. 11 and O. XLVII, r. 1.* The High Court has no authority, merely on the ground of alleged discovery of new and important evidence, to review an order dismissing an application for the admission of a second appeal under O. XLI, r. 11 of the Code of Civil Procedure. *Bhyrub Nath Toee* v. *Kally Chunder Chowdhry, 16 W. R. 112,* followed. *Heera Lall Ghose* v. *Ram Taruck Dey, 23 W. R. 323,* discussed. *Raru Kutti* v. *Mamad, I. L. R. 18 Mad. 480,* and *In re Nand Kishore, I. L. R. 32 All. 71,* referred to. RAJANI KANTA DAS *v.* KALI PRASANNA MUKHERJEE (1914). **I. L. R. 41 Calc. 809**

REVIEW OF JUDGMENT.

See CIVIL PROCEDURE CODE (1908), O. XLVII, R. 1. **I. L. R. 36 All. 277**

REVIEW PETITION.

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XLVII, R. 1. **I. L. R. 38 Bom. 416**

REVISION.

See APPEAL. **I. L. R. 41 Calc. 323**

See ARBITRATION. **I. L. R. 36 All. 354**

See CRIMINAL PROCEDURE CODE, SS. 145, 435. . . **I. L. R. 36 All. 233**

See CRIMINAL PROCEDURE CODE, SS. 195, 439. . . **I. L. R. 36 All. 403**

See CRIMINAL PROCEDURE CODE, SS. 403, 423, 439. . . **I. L. R. 36 All. 4**

——— **by High Court.**

See TEMPORARY INJUNCTION. **I. L. R. 41 Calc. 436**

REVOCATION.

——— **of gift—**

See MUHAMMADAN LAW—GIFT. **I. L. R. 36 All. 333**

RIGHT OF PRIVATE DEFENCE.

See RIOTING. . **I. L. R. 41 Calc. 43**

RIOTING.

1. ——— *Grievous hurt—Delivery of possession alleged to be of doubtful legality and objected to—Objection pending for decision at the time of occurrence—Effect of such delivery and actual possession thereunder—Distinction between enforcing and maintaining a right—Right of private defence—Penal Code (Act XLV of 1860), ss. 147 and* $\frac{353}{149}$. Where the servants of a party, who had obtained delivery of possession of certain land, in execution of a decree, went upon it accompanied by a number of others armed with *lathis,* and were engaged in ploughing it, when they were attacked by a large body of men belonging to the party of the judgment-debtor, and thereupon a fight ensued in the course of which some members of both sides received injuries: *Held,* that their master having been put in actual possession by a competent Court, the servants were not gulity of rioting or of constructive grievous hurt, though the delivery of possession was alleged to be of doubtful legality and was the subject of an objection by the judgment-debtor pending decision at the time of the occurrence. A delivery not merely gives possession to a party, but connotes permission to utilize the subject of it in any lawful manner, such as entering upon the land, tilling it, growing and harvesting the crops, and enjoying the produce. Persons engaged in the exercise of a lawful right, of which they are in enjoyment, cannot be said to be enforcing a right but merely to be maintaining it. *Pachkauri* v. *Queen-Empress, I. L. R. 24 Calc. 686,* followed. FATEH SINGH *v.* EMPEROR (1913). . . . **I. L. R. 41 Calc. 43**

2. ——— *Assaulting a public servant in execution of duty—Power of excise inspector or sub-inspector to enter a house to arrest without warrant persons found illicitly distilling liquor—Search—Formalities before search—Penal Code (Act XLV of 1860) ss. 147 and 353—Bengal Excise Act (Beng. V of 1909) ss. 67 and 70—Rules by Local Government—Rule 75—Instruction of Board of Revenue—Chapter X, Rule (8).* S. 67 of the Bengal Excise Act (V of 1909) confers wider powers on excise officers than were given under the former Act. Under s. 67 read with rule 75 of the Rules framed by the Local Government, an excise inspector and sub-inspector may enter a house for the purpose of arresting without a warrant a person found in the illicit distillation of liquor. S. 67 does not relate to any search, and an excise officer not below the rank of a sub-inspector entering a house for the purpose mentioned therein, is not required to comply with the formalities prescribed in Ch. X, r. (8), of the Instructions of the Board of Revenue, unless he finds it necessary further to make a search in the house. Where an excise sub-inspector accompanied by a constable and two chowkidars and excise peons, went to the house of the accused in order to arrest without warrant persons found in the act of illicit distillation of liquor, and were attacked and beaten by them before they had time to enter or search the same: *Held,* that they were acting legally under s. 67 of the Bengal Excise Act, and that the accused were rightly convicted under ss. 147 and 353 of the Penal Code. On a charge of rioting, with the common object of assaulting public servants, persons

RIOTING—*concld.*

shown to have committed a separate offence under s. 353 of the Penal Code may be separately sentenced thereunder. Formalities required by law prior to search considered. PROKASH CHANDRA KUNDU *v.* EMPEROR (1914).

I. L. R. 41 Calc. 836

RISK NOTE.

——— **form H—**

See RAILWAY COMPANY.

I. L. R. 41 Calc. 576

RULES AND ORDERS, HIGH COURT, CALCUTTA.

——— **rr. 136 (*a*), 42 (*a*), of Ch. VI; r. 26 Ch. X—**

See PLEADER'S FEE.

I. L. R. 41 Calc. 637

RYOTI LAND.

See MADRAS ESTATES LAND ACT (I OF 1908), SS. 9, 11, 151, 157, 187(*g*).

I. L. R. 37 Mad. 432

S

SALARY.

——— **of officer of Indian Staff Corps—**

See ATTACHMENT.

I. L. R. 38 Bom. 667

See CIVIL PROCEDURE CODE (1908), S. 60, CL. (2), (*b*). **I. L. R. 38 Bom. 667**

SALE.

See APPEAL. **I. L. R. 41 Calc. 418**

——— **by mother—**

See MAHOMEDAN LAW—MINOR.

I. L. R. 37 Mad. 514

——— **validity of—**

See TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 85, 91.

I. L. R. 37 Mad. 418

——— *Contract for sale—Transfer of Property Act (IV of 1882), s. 54—Patni—Rent, liability for—Mere possession without assignment of lease, effect of.* A contract for sale, as defined by s. 54 of the Transfer of Property Act, does not of itself create an interest in property, and therefore a mere agreement to buy does not create a liability to pay the rent of the tenure, the subject-matter of the contract for sale. *Cox* v. *Bishop, 8 DeG. M. & G. 815*, and *Chaturbhuj Morarji* v. *Bennett, I. L. R. 29 Bom. 323*, referred to. Mere possession of a *patni* will not render a man liable for rent if the lease has not been assigned to him. *Close* v. *Wilberforce, 1 Beav. 112, Sanders* v. *Benson, 4 Beav. 350, Flight* v. *Bentley, 7 Sim. 149*, and *Walsh* v. *Lonsdale, L. R. 21 Ch. 9*, referred to. *Prosunno Coomar Paul Chowdhury* v. *Koylash Chunder Paul Chowdhury, 8 W. R. 428, Macnaghten*

SALE—*concld.*

v. *Bheekaree Singh, 2 C. L. R. 323, Kasi Kinkar Sen* v. *Satyendra Nath Bhadra, 15 C. W. N. 191*, and *Abdul Rab Chowdhury* v. *Eggar, I. L. R. 35 Calc. 182*, distinguished. ANANDA CHANDRA ROY *v.* ABDULLAH HOSSEIN CHOWDHURY (1913).

I. L. R. 41 Calc. 148

SALE FOR ARREARS OF REVENUE.

See REVENUE SALE.

——— *Share of estate not sold at auction—Payment of arrears by defaulting proprietor—Subsequent payment by co-sharer—Priority between depositors—Suit to set aside sale—Revenue Sales Act (XI of 1859), ss. 13, 14, 33, 53.* In respect of a certain *touzi* numerous separate accounts had been opened in the Collector's register. The plaintiff had an interest in separate account No. 282, the 1st defendant in No. 168 and the 2nd defendant in No. 222. Several of these accounts fell into arrears and among them was No. 222 and a residuary share. No. 222, which formed the subject-matter of the present suit, was, among others, advertised to be put up for sale, on the 20th September, 1909; but as no bid was received, the Collector, under s. 14 of Act XI of 1859, declared that the entire estate would be put up for sale at a future date, unless the other sharer or sharers paid up the arrears within 10 days. On the 21st and 28th September 1909, the 1st defendant paid into the Treasury the whole of the arrears in respect of all the various accounts including No. 222 and the residuary share. On the 30th September 1909, the plaintiff deposited into the Treasury the arrears due on some of the accounts, including No. 222, but excepting the residuary share. Subsequently, the Collector declared the defendant No. 1 purchaser of the estates represented by the various separate accounts. On appeal to the Commissioner, the decision of the Collector was upheld and the sale confirmed on the 8th February 1910. Thereafter, the 1st defendant took possession of the several properties and on the 21st December 1910, he conveyed the same by sale to the 3rd defendant. On the 7th February 1911, the plaintiff presented his plaint for recovery of possession of No. 222 and in the alternative for the possession of the half share in it, but owing to the plaint being insufficiently stamped, time to pay in the proper court-fee was granted to the plaintiff with the compliance of the defendants. At the expiry of such time some holidays intervened and it was not till the 2nd March 1911, that the plaint was actually filed. The District Judge having decreed the suit, the 3rd defendant alone appealed to the High Court. *Held*, that the question of limitation could not now be raised, but it is improper for a Court to extend the period of limitation for the institution of a suit merely for the convenience of the plaintiff. *Held*, further, that there could be no doubt that the 2nd defendant was the real purchaser both in the purchase by the 1st defendant in September 1909, and in the sale by the 1st defendant to the 3rd defendant in December 1910. *Held*, further, that in s. 14, of

SALE FOR ARREARS OF REVENUE—*concld.*

the Revenue Sales Act, 1859, the words "other recorded sharer" must mean a recorded sharer of a share other than the share exposed for sale." *Quære:* Whether the Legislature intended to exclude a defaulting sharer of a share exposed for sale from purchasing such share under s. 14. *Held*, further, that the estate could only be sold if the whole of it was in arrears, and that it could not be said that the plaintiff's deposit was insufficient without proof of that fact. *Held*, further, that as soon as the payment was made the purchase was complete and there was nothing left for any one else to buy; and that the Collector was bound to recognize the depositor who first paid the whole amount, or if there were more depositors than one, to recognise as joint purchasers those whose payments first amounted to the total arrears due. *Debi Pershad* v. *Aklio Koer 4 C. W. N. 465*, referred to. *Held*, further, that the suit was barred by s. 33 of the Revenue Sales Act, 1859. *Gossain Chutturbhooj Dut* v. *Ishri Mul, I. L. R. 21 Calc. 844*, and *Gobind Lal Roy* v. *Ramjanam Misser, I. L. R. 21 Calc. 70*, followed. BAHURIA SAMBHO KUAR *v.* HARIHAR PRASAD (1914).

I. L. R. 41 Calc. 1092

SALE IN EXECUTION OF DECREE.

See EXECUTION OF DECREE.

I. L. R. 36 All. 529

——————— *Description of property in schedule to execution proceedings—Confirmation of sale—Order granting certificate of sale of property different from that described in schedule—Alleged mistake—Order set aside as having been made without jurisdiction.* Certain property to be sold under a decree was described in the schedule to the application for execution, and in the proclamation of sale as a six-anna share of a mahal subject to an existing mortgage; and after the sale had been confirmed the auction-purchasers applied for a certificate of sale, and, alleging, that a mistake had been made in the schedule by the omission of the word "not," asked to have the purchased property declared in the certificate to be a six-anna share of the mahal *not* encumbered by the mortgage. The alleged mistake was stated to have been corrected before the sale by an advertisement in the *Calcutta Gazette*. The Subordinate Judge granted a certificate of sale in that form, and his order was upheld by the High Court. *Held* (reversing those decisions), that what is sold at a judicial sale can be nothing but the property attached, which in this case was the property described in the schedule in the execution proceedings. It was not a case of misdescription which might have been treated as an irregularity. Identity and not description had here to be dealt with. An existing property was accurately described in the schedule and the order of the Subordinate Judge granted a sale certificate which stated that another and a different property had been purchased at the judicial sale. If by mistake the wrong property was attached and sold, the only course was for the decree-holders to commence the

SALE IN EXECUTION OF DECREE—*concld.*

execution proceedings over again. The advertisement in the Gazette purporting to correct the alleged mistake could not validate a sale of property which was not that to which the attachment related. The order of the Subordinate Judge was made without jurisdiction as there was no power to sell in the judicial proceedings the property which the certificate of sale declared had been purchased. Their Lordships set aside the order confirming the sale together with the sale certificate granted thereunder. THAKUR BARMHA *v.* JIBAN RAM MARWARI (1913). . **I. L. R. 41 Calc. 590**

SALE OR AGREEMENT TO SELL.

See CONSTRUCTION OF DOCUMENT.

I. L. R. 37 Mad. 480

SALE OR EXCHANGE.

See TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 54, 118.

I. L. R. 37 Mad. 423

SALE PROCEEDS.

See CRIMINAL BREACH OF TRUST.

I. L. R. 41 Calc. 844

See LIMITATION. **I. L. R. 41 Calc. 654**

SALTPETRE.

See NIMAK-SAYAR MEHAL.

I. L. R. 41 Calc. 286

SANCTION FOR PROSECUTION.

See APPEAL TO PRIVY COUNCIL.

I. L. R. 41 Calc. 734

See CRIMINAL PROCEDURE CODE, S. 195.

I. L. R. 36 All. 469

See CRIMINAL PROCEDURE CODE, SS. 195, 439. . . **I. L. R. 36 All. 403**

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), S. 195 (*1*), (*c*).

I. L. R. 37 Mad. 107

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), S. 195, CLS. (*b*), (*c*).

I. L. R. 38 Bom. 642

See CRIMINAL PROCEDURE CODE (ACT V OF 1198), S. 476.

I. L. R. 37 Mad. 317

See PENAL CODE (ACT XLV OF 1860), SS. 182, 211. . **I. L. R. 36 All. 212**

1. ——————— *Disobedience of prohibitory order—Necessity of application for sanction—Police report setting forth the facts of disobedience, and containing a request for prosecution—Criminal Procedure Code (Act V of 1898), s. 195 (1) (a)—Penal Code (Act XLV of 1860), s. 188.* A police report which sets out the facts of disobedience of an order, under s. 144 of the Criminal Procedure Code, prohibiting the slaughter of cows on a certain day, and contains a request that the accused should be prosecuted, under s. 188 of the Penal Code, is a sufficient application for sanction within s. 195 (*1*)

SANCTION FOR PROSECUTION—*concld.*

(*a*) of the Criminal Procedure Code. *Per* CHAPMAN J. No application for sanction is necessary in cases falling under s. 195 (*1*) (*a*) of the Code. PANCHU MANDAL *v.* EMPEROR (1913).

I. L. R. 41 Calc. 14

2. ——— *Discretion—Judicial decisions, application of—Criminal Procedure Code (Act V of 1898), ss. 4(t), 195, 476, 492—S. 195, scope of and practice under—Public Prosecutor.* S. 195 of the Code of Criminal Procedure vests in the Court an absolute discretion as regards granting sanction to prosecute: this discretion cannot be restricted by judicial decisions, but must be fairly exercised according to the exigencies of each case, the Court being astute to see that there is no abuse of the administration of criminal justice. *Gardner* v. *Jay, L. R. 29 Ch. D. 50*, and *Saunders* v. *Saunders, [1897] P. 89*, referred to. Under s. 195, no notice of the application for sanction need issue and the accused person need not even be named. The validity of the sanction cannot be questioned in the enquiring or the trying Court. *Per* STEPHEN J: Proceedings under s. 195 should frequently and even usually be *ex parte*. *In re Paree Kun hammed, I. L. R. 26 Mad. 116, Pampapati Sastri* v. *Subba Sastri, I. L. R. 23 Mad. 210, In the matter of Gauri Sahai, I. L. R. 6 All. 114, Ram Prosad Roy* v. *Sooba Roy, 1 C. W. N. 400, Radha Nauth Banerjee*, v. *Kangalee Mollah, 1 Marsh. 407, Queen* v. *Mahomed Hossain, 16 W. R. Cr. 37, Sharp* v. *Wakefield, [1891] A. C. 173, Khepu Nath Sikdar* v. *Grish Chunder Mukerji, I. L. R. 16 Calc. 730, Baperam Surma* v. *Gaurinath Dutt, I. L. R. 20 Calc. 474, Mahomed Bhakku* v. *Queen Empress, I. L. R. 23 Calc. 532, In the matter of Mutty Lall Ghose, I. L. R. 6 Calc. 308*, cited and discussed by Chaudhuri J. An attorney is criminally liable for a false statement in an affidavit made by him in answer to a Rule issued against him under the disciplinary jurisdiction of the Court. *In re* AN ATTORNEY (1913). . . **I. L. R. 41 Calc. 446**

SARBARAKAR (ORISSA).

——— *Sarbarakar in Orissa, status of, if that of tenure-holder—Dalbehera jagirs—resumption and settlement of—Effect—Lands reserved to Dalbeheras at resumption, tenure in.* The *jagirdars* of the military *jagirs* into which, under Native Princes, the greater part of Killah Khurdah (in Orissa) was parcelled out (styled the Dalbeheras) and native revenue officers known as Pradhans, Bhuimals, Kotekharans, Kowri-Bhagias, when the *jagirs* were resumed by the British Government, engaged with Government under the denomination of *sarbarakars* for the collection and payment of the revenue assessed by it. *Held*, on the evidence, that although from 1818 onwards the tendency of Government and of the majority of its officers was to regard the *sarbarakars* as mere office-holders, they themselves had never, before 1861, distinctly acknowledged that this was their position, and on the other hand had asserted their status as tenants and there were circumstances connected with their tenure of the lands which militated against the

SARBARAKAR (ORISSA)—*concld.*

Government's view of their position as servants and their status under their engagement with Government was something higher than that of servants. That from 1861 to 1896, defendant No. 1, the present *sarbarakar*, and his father before him were regarded and treated as tenants and they have successfully asserted their status and maintained their possession as such. That the defendant No. 1's status is that of a tenure-holder. *Sarbarakars* who were originally Dalbehera *jagirdars* could not in any case be ejected from lands which were reserved to the Dalbeheras at the general resumption of the *jagirs* KRIPASINDHU ROY *v.* PARMANAND DAS (1913).

18 C. W. N. 74

SATI.

See PENAL CODE, S. 306.

I. L. R. 36 All. 26

SATISFACTION.

See CIVIL PROCEDURE CODE (1882), S. 257A. . **I. L. R. 38 Bom. 219**

SEARCH.

See SEARCH BY POLICE OFFICERS.

——— **formalities of—**

See RIOTING. . **I. L. R. 41 Calc. 836**

——— **irregularities in—**

See DACOITY. . **I. L. R. 41 Calc. 350**

SEARCH BY POLICE OFFICERS.

——— *Power to search the house of an accused for specific documents and things—Resisting such search—Criminal Procedure Code (Act V of 1898), ss. 94, 165—Penal Code (Act XLV of 1860), s. 353.* Ss. 94 and 165 of the Criminal Procedure Code extend to accused persons. The latter section authorizes a search of the house of the accused for specific documents and things necessary to the conduct of an investigation into an offence. *Mahomed Jackriah & Co.* v. *Ahmed Mahomed, I. L. R. 15 Calc. 109*, followed. *Nizam of Hyderabad* v. *Jacob, I. L. R. 19 Calc. 52*, referred to. *Bajrangi Gope* v. *Emperor, I. L. R. 38 Calc. 304*, and *Prankhang* v. *King-Emperor, 16 C. W. N. 1078*, commented on and explained. *Ishwar Chandra Ghoshal* v. *Emperor, 12 C. W. N. 1016*, distinguished. Where information was laid at the thana of criminal breach of trust by a servant, of a particular sum of money and he was arrested, and thereafter the sub-inspector of Police proceeded with the informant and searched a house in the joint possession of the suspect and his brothers, whereupon they and others resisted the search and assaulted the sub-inspector and confined and assaulted the informant: *Held*, that the search was lawful under s. 165 of the Criminal Procedure Code, and that the conviction therefor must be upheld. BISSAR MISSER *v.* EMPEROR (1913).

I. L. R. 41 Calc. 261

SEBAIT.

See BUSTEE LAND.

I. L. R. 41 Calc. 104

SEBAIT—*concld.*

See LIMITATION. . **L. R. 41 I. A. 267**
See SHEBAIT.

SECOND APPEAL.

See CIVIL PROCEDURE CODE (1908), S. 100. **I. L. R. 36 All. 256**

See LIMITATION ACT (IX OF 1908), S. 5. **I. L. R. 38 Bom. 613**

See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SCH. II, ARTS. 3 AND 28. . **I. L. R. 37 Mad. 533, 538**

See REVIEW. . **I. L. R. 41 Calc. 809**

See SPECIAL APPEAL.

See TRANSFER OF PROPERTY ACT (IV OF 1882), S. 41. . **I. L. R. 36 All. 308**

——— *Land Acquisition Act (I of 1894), s. 54—Bombay Civil Courts Act (XIV of 1869), s. 16—Civil Procedure Code (Act V of 1908), s. 96(1)—Reference to Assistant Judge—Award not exceeding Rs. 5,000—Appeal to the District Judge—Second appeal to the High Court not maintainable.* A reference having been made in accordance with the provisions of the Bombay Civil Courts Act (XIV of 1869) to the Assistant Judge, he tried the reference and made an award under the Land Acquisition Act (I of 1894) which did not exceed Rs. 5,000. An appeal was presented against the said award to the District Judge and he having decided the appeal, a second appeal was preferred to the High Court. *Held*, that under s. 16 of the Bombay Civil Courts Act (XIV of 1869) the Court authorized to hear appeals from the Assistant Judge's Court where the value of the subject matter was less than Rs. 5,000, was the District Court and not the High Court and no second appeal being expressly given by the Act, the (second) appeal to the High Court was not maintainable. AHMEDBHOY HABIBBHOY *v.* WAMAN DHONDU (1913). **I. L. R. 38 Bom. 337**

SECOND MORTGAGEE.

——— **suit by, for surplus proceeds—**

See LIMITATION. **I. L. R. 41 Calc. 654**

SECOND TRIAL.

See AUTREFOIS ACQUIT. **I. L. R. 41 Calc. 1072**

SECRETARY OF STATE FOR INDIA.

——— **notice of suit against—**

See CIVIL PROCEDURE CODE (ACT V OF 1908), S. 80. **I. L. R. 37 Mad. 113**

——— *Suit against in respect of illegal order of District Magistrate under Assam Labour Emigration Act (VI of 1901), s. 91, and also for alleged defamation in a Government order—Damage, remoteness of—Liability of defendant under the Government of India Act, 1858, not liable here on the ground that the order was made in the course of employment, nor for acts done by Government servants*

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in exercise of statutory powers—Alleged ratification by the Local Government—Government order—Absolute privilege. Suit by the plaintiff, who represented the Assam Labour Supply Association in Ganjam and other districts, against the Secretary of State for India in Council for damages in respect of two orders of the District Magistrate of Ganjam suspending and dismissing one T. S., the local agent of the Association in Ganjam and closing his depôt to recruiting under the Assam Labour and Emigration Act (VI of 1901), whereby the plaintiff was prevented from earning from the members of the Association his commission of seven rupees for each labourer sent to Assam; and for an alleged libel on the plaintiff in an order passed by the Governor in Council on appeals by the plaintiff and other against the aforesaid orders, in which it was stated that the plaintiff's own conduct was not altogether above suspicion. *Held*, under the Notification issued pursuant to s. 91 of the aforesaid Act as amended relaxing the provisions of the Act in favour of the Association, the District Magistrate had power to dismiss the local agent but not to suspend him or to close his depôt to recruiting under the Act independently of the Notification. *Semble:* That the damage to the plaintiff by reason of the loss of his commission was too remote. The defendant's liability to suit is the same as that of the East India Company before the passing of the Government of India Act, 1858; it can only be altered by Act of Parliament, and is not affected by s. 79, Civil Procedure Code. Extent of such liability in respect of acts done in the exercise of sovereign powers not being acts of State, discussed. It was not sufficient to render the Company liable that an act of this nature had been done by its servant in the course of employment but without previous order or subsequent ratification. Ratification must have been by the Company and must now be by the Secretary of State. Essentials of ratification discussed. In the present case the defendant was not liable for the act of the District Magistrate on the further ground that it was done by him in the exercise of statutory authority and not as an agent of Government. Further, as to the alleged defamation, the order of the Government of Madras, having been published in the execution of its duty and without exceeding it, was absolutely privileged, and in any case there was no evidence of malice. *Dhakjee Dadajee* v. *East India Company, 2 Mor. Dig. 307, Peninsular and Oriental Steam Navigation Company* v. *The Secretary of State, 5 Bom. H.C.R. Appx. 1, Hari Bhanji* v. *The Secretary of State for India, I. L.R. 4 Mad. 344, Shivabhajan* v. *The Secretary of State for India, I.L.R. 28 Bom. 314*, referred to. *Vijaya Ragava* v. *The Secretary of State for India, I.L.R. 7 Mad. 466*, questioned. ROSS *v.* SECRETARY OF STATE FOR INDIA (1913).

I. L. R. 37 Mad. 55

SECURITY.

See CRIMINAL PROCEDURE CODE, SS. 112, 167. . . **I. L. R. 36 All. 262**

SECURITY—*concld.*

See STAY OF EXECUTION.
I. L. R. 41 Calc. 160

SECURITY FOR COSTS.

See CIVIL PROCEDURE CODE (1908), SS. 109, 110; O. XLI, R. 10.
I. L. R. 36 All. 325

SECURITY FOR GOOD BEHAVIOUR.

See CRIMINAL PROCEDURE CODE, SS. 118, 123. . . **I. L. R. 36 All. 495**

See CRIMINAL PROCEDURE CODE, SS. 119, 437. . . **I. L. R. 36 All. 147**

——————— *Proceedings taken and enquiry completed in one day—Production of party called upon for security under arrest before the Magistrate in Camp—Right of party to examine his own defence witnesses—Right of opportunity to examine or summon witnesses selected by such party—Fair trial—Criminal Procedure Code (Act V of 1898) ss. 110 (d), 112, 117—Practice.* Under s. 117 (2) of the Criminal Procedure Code a person called upon to furnish security for good behaviour must be given time, as in warrant cases, to bring his witnesses and have their evidence recorded. Where a person was produced in custody before a Magistrate in camp, while on tour, when only a single mukhtear was available, and a proceeding under s. 110 (*d*) was drawn up immediately, read and explained to him after which prosecution witnesses were examined and cross-examined, and he was called upon for his defence and some of the spectators who happened to be present were examined on his behalf, and the enquiry was completed and the order for security passed on the same day: *Held*, that the order was bad, as the person directed to execute a bond had not been given the opportunity of selecting his own witnesses and of producing them or having them summoned; and that he did not, therefore, have a fair trial. KERAMUDDIN SARKAR *v.* EMPEROR. (1914). . . **I. L. R. 41 Calc. 806**

SECURITY TO KEEP THE PEACE.

See CRIMINAL PROCEDURE CODE, SS. 107, 145. . . **I. L. R. 36 All. 143**

See CRIMINAL PROCEDURE CODE, SS. 107, 250. . . **I. L. R. 36 All. 382**

See CRIMINAL PROCEDURE CODE S. 125.
I. L. R. 37 Mad. 125

——————— **proceedings for—**

See TRANSFER. . **I. L. R. 41 Calc. 719**

SEIZURE IN CUSTOM HOUSE

See COCAINE, IMPORTATION OF.
I. L. R. 41 Calc. 545

SENTENCE.

See CRIMINAL PROCEDURE CODE, S. 423.
I. L. R. 36 All. 485

See PENAL CODE (ACT XLV OF 1860), S. 62. . . **I. L. R. 36 All. 395**

SENTENCE—*concld.*

——————— **enhancement of—**

See CRIMINAL PROCEDURE CODE, S. 448.
I. L. R. 36 All. 378

SEPARATE OFFENCES.

See CHARGE. . **I. L. R. 41 Calc. 66**

SERVICE OF NOTICE.

See FOREIGN JUDGMENT.
I. L. R. 37 Mad. 163

SERVICE OF SUIT.

——————— **on principals outside jurisdiction—**

See FOREIGN JUDGMENT.
I. L. R. 37 Mad. 163

SESSIONS TRIAL.

See CROSS-EXAMINATION.
I. L. R. 41 Calc. 299

SETTLEMENT OF REVENUE.

——————— *Temporary Settlement—Effect on permanent interest—Entry in settlement records, effect of.* Certain lands were held under the Government under a temporary settlement during the currency of which the holders granted a permanent sub-lease to the plaintiffs who before the expiration of the lease granted by Government granted a permanent lease to one of the grantors. Ever since then the sub-lessee and his successor-in-interest were in occupation of the land, the settlement being from time to time renewed by Government in favour of the original settlement-holders or their representatives, but in the course of the last settlement the under-tenures were not mentioned in the settlement records. *Held* (in a suit for rent by the plaintiffs), that the mere omission of the settlement authorities to make an entry in the settlement records in respect of the tenures and under-tenures cannot affect the rights of the parties; and the effect of the re-settlement by the Government with the original settlement-holders was to keep alive the contractual obligation of the subordinate holders among themselves. The rights and obligations of the parties were mutual, the plaintiffs being bound to make good the title of the defendants as soon as by virtue of the re-settlement they were placed in a position to continue the lease in favour of the defendants, and the defendants being under an obligation to continue as tenants under the plaintiffs on the basis of the lease and to pay rent accordingly. MOHENDRA NATH BISWAS *v.* SHYAM LAL BANERJEE (1912).
18 C. W. N. 907

SHAFA.

——————— **right of—**

See MAHOMEDAN LAW—PRE-EMPTION.
I. L. R. 41 Calc. 943

SHARE OF ESTATE.

See SALE FOR ARREARS OF REVENUE.
I. L. R. 41 Calc. 1092

SHARES.

——————— **allotment of—**

See COMPANY. **I. L. R. 36 All. 412**

SHARE—*concld.*

———— sale of—

See COMPANY . **I. L. R. 36 All. 365**

SHEBAIT.

See HINDU LAW—SHEBAIT.

See SEBAIT.

SHIAS.

See MAHOMEDAN LAW—GIFT.

I. L. R. 36 All. 289

See MAHOMEDAN LAW—WAQF.

I. L. R. 36 All. 431, 466

SHIPPING COMPANY.

———— liability of—

See CONTRACT . **I. L. R. 41 Calc. 670**

SINGLE JUDGE, ORDER OF.

See APPEAL. . **I. L. R. 41 Calc. 323**

SISTERS.

See BURMESE LAW—INHERITANCE.

I. L. R. 41 Calc. 887

SMALL CAUSE SUIT.

See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SS. 23, 27.

I. L. R. 38 Bom. 190

SONTHAL PARGANAS.

See JURISDICTION **L. R. 41 I. A. 197**

See SONTHAL PARGANAS ACT.

1. ———— *High Court Jurisdiction of—Suits exceeding Rs. 1,000 in value—Sonthal Parganas Civil Rules, 1905, r. 29—Sonthal Parganas Act (XXXVII of 1855), ss. 1, cl. (2), and 2—Sonthal Parganas Settlement Regulations (III of 1872), s. 27—Sonthal Parganas Justice Regulation (V of 1893), s. 5—Civil Procedure Code (Act V of 1908) s. 115—The Charter Act (24 & 25 Vic. c. 104) s. 15.* In a suit in which the matter in dispute exceeds Rs. 1,000, the High Court is not debarred by anything in the local Acts and Regulations of the Sonthal Parganas from revising the proceedings of the Subordinate Judge, who is subject to the jurisdiction of the High Court under the general powers of superintendence over the subordinate Courts, as contained in the Charter, and an order by the Subordinate Judge adjourning a mortgage sale, pending an enquiry directed to be made by the Deputy Commissioner, may be revised by the High Court. The High Court, however, cannot interfere with an order of the Deputy Commissioner directing an enquiry or with an enquiry by the Sub-divisional Officer. *Dungaram Marwary* v. *Rajkishore Deo*, I. L. R. 18 Calc. 133, followed *Tej Ram* v. *Horsukh, I.L.R. 1 All. 101*, referred to. SARDHARI SAH *v.* HUKUM CHAND SAH (1914).

I. L. R. 41 Calc. 876

2. ———— *Mortgage of land in, not completely settled—Suit in Civil Court at Bhagalpur on mortgage, if lies—Limits of Civil*

SONTHAL PARGANAS—*contd.*

Court's Jurisdiction—Exclusive jurisdiction of special officers appointed by Lieutenant-Governor—Stipulation in bond that suit might be instituted at Bhagalpur—"Court having jurisdiction in Sonthal Parganas," if includes Civil Courts at Bhagalpur—Sonthal Parganas Regulation, III of 1872 (read with Act XXXVII of 1855 and Act X of 1857), ss. 5, 6—Interest—Usury rules enforceable by all Courts—Sonthal Parganas Justice Regulation (V of 1893), s. 9—Civil Procedure Codes (Act VIII of 1859, Act XXIII of 1861, Act X of 1877, Act XIV of 1882) how far applicable in Sonthal Parganas—Civil Courts Acts (Act VI of 1871 and Act XII of 1887) how far apply in Sonthal Parganas—Scheduled Districts Act (XII of 1874) if applied to Sonthal Parganas—Jurisdiction, objection to, taken at a late stage when entertainable. Held, that on 20th June 1904, the date on which the present suit was instituted in the Subordinate Judge's Court at Bhagalpur to enforce a mortgage of properties two-thirds of which was in the Sonthal Parganas, no suit could lie in any Court established under the Civil Courts Act of 1871 or 1887, in regard to any land or interest in or arising out of any land or for the rents or profits of any land, but such suits must have been brought under s. 5 of Sonthal Parganas Regulation of 1872 before the Settlement Officers or Courts of officers appointed by the Lieutenant-Governor of Bengal under s. 2 of the Sonthal Parganas Act, 1855, and the Sonthal Parganas Justice Regulation of 1893, Part 2, so long as the land had not been settled and the settlement declared by a notification in the *Calcutta Gazette* to have been completed and concluded. That as it appeared that portions only of the mortgaged land had been settled and notification made prior to the institution of the suit of the completion of the settlement in respect of such portions only, the suit came within s. 5 of the Sonthal Parganas Regulation of 1872 and the Subordinate Judge of Bhagalpur had no jurisdiction to entertain it. The provision in s. 6 of that Regulation which places all contractual stipulation as to compound interest in a position of non-enforcibility and limits statutably the total interest which can be decreed on any loan or debt is not one of procedure, but of substance, and applies to all Courts having jurisdiction in the Sonthal Parganas and acting under and by virtue of such jurisdiction. "All Courts having jurisdiction in the Sonthal Parganas" in s. 6 do not refer only to Courts locally situated in the Sonthal Parganas and dealing with matters purely local. A stipulation in the mortgage-bond that the mortgagees might enforce it in the Court at Bhagalpur was inoperative, as the parties could not by consent give the Court jurisdiction thereby nullifying the express prohibition of s. 5 of the Regulation of 1872. The Civil Procedure Codes of 1861, 1877 and 1882 applied to suits cognizable in the ordinary Civil Courts, and these, since the enactment of s. 9 of Reg. V of 1893, were suits of which the value exceeded Rs. 1,000 and which were not excluded from their cognizance by, amongst others, the provisions of s. 5 of the Regu-

SONTHAL PARGANAS—*concld.*

lation of 1872. *Quære:* Whether the Civil Procedure Code was intended by the Notification of 19th August 1867 to apply to Courts held by officers appointed by the Lieutenant-Governor of Bengal in those suits in which they were not required to try and determine the case according to the several laws and regulations prevailing in Bengal. *Semble:* The true interpretation of cl. (1) of Act XXXVII of 1855 (before its operation was modified by subsequent enactments and notifications) was that even suits on which the matter in dispute exceeded Rs. 1,000 in value were to be tried by the special officers appointed by the Lieutenant-Governor, but in trying and determining them, they were to observe the general laws and regulations obtaining in Bengal. *Sorbojit Roy* v. *Ganesh Prosad Missir, I. L. R. 10 Calc. 761,* doubted. MAHA PRASAD SINGH *v.* RAMANI MOHAN SINGH. (1914).
18 C. W. N. 994

SONTHAL PARGANAS ACT (XXXVII OF 1855).

——— **s. 2.**

See JURISDICTION . **L. R. 41 I. A. 197**

SONTHAL PARGANAS JUSTICE REGULATION (V OF 1893).

——— **part II—**

See JURISDICTION. **L. R. 41 I. A. 197**

SONTHAL PARGANAS SETTLEMENT REGULATION (III OF 1872).

See JURISDICTION.
I. L. R. 41 Calc. 915

See SONTHAL PARGANAS.
I. L. R. 41 Calc. 876

——— **ss. 5, 6—**

See JURISDICTION . **L. R. 41 I. A. 197**

——— **ss. 10, 11.**—*Sonthal Parganas Settlement Rules, No. 27—Succession to jote held by Hindu goala—Local Custom if applies to Hindu immigrants—Point incidentally decided in settlement proceeding, if res judicata.* A finding of the Settlement Officer in a proceeding under the Sonthal Parganas Regulation, III of 1872, which was not necessary for the purpose of the proceeding and was arrived at only incidentally does not operate as *res judicata.* Rule 27 of the Sonthal Parganas Settlement Rules under which resident relatives who have taken part in the management of the family *jote* are to be given preference as heirs, is only applicable to suits before Settlement Officers. The Rule was intended to meet the peculiar customs of the Sonthals and aborigines in the locality and does not apply to persons governed by the Hindu Law, who have settled in the Sonthal Parganas. BASKI MAMRIK *v.* SUPHAL MANJHI (1913).
[18 C. W. N. 333

——— **ss. 11, 25, 25A**—*Entry in record-of-rights operating as decree—Claim not expressly negatived by Settlement Court, if open to investigation in Civil Court—Entry in record set up as plea in bar—What must be proved for entry to operate as res judicata—Proof that entry obtained by fraud.* Where in a suit for rent instituted by the plaintiff in part as zemindar and in part as *mokuraridar,* the defendants objected to the recovery of the rent alleged to be due to the plaintiff as *mokuraridar* on the ground that in the record-of-rights prepared and finally published under the Sonthal Parganas Regulation, III of 1872, the defendants were recorded as *putnidars* only: *Held,* that under s. 11 of the Regulation the entry operated as a decree of a Civil Court. That it was not open to the plaintiff to urge that as there was no express decision of the Settlement Court upon the question of the *dar-mokurari* status of the defendants the matter was open for investigation in a Civil suit inasmuch as it must be held that there was such a decision by implication. *Held,* however, that it was for the defendants, who pleaded the entry as a bar, to establish the circumstances in which the decree was made and to prove conclusively that the decree does operate as *res judicata.* That the defendants must prove that in the preparation and final publication of the record-of-rights the requirements of the statute had been fulfilled, and it was open to the plaintiff to urge and prove that the entry which was to operate as a decree was obtained by fraud. *Ram Narain Singh* v. *Ram Runjan Chuckerbutty, I. L. R. 13 Calc. 245, Nadiar Chand Singh* v. *Chandra Sikhor Sadhu, I. L. R. 15 Calc. 765, Rajib* v. *Lakhan, I. L. R. 27 Calc. 11, Nistarini* v. *Nundalal, I. L. R. 30 Calc. 369,* relied on. MOZAFFER ALI *v.* KALI PROSAD SAHA (1913).
18 C. W. N. 271

SPECIAL APPEAL.

See SECOND APPEAL.

——— *Civil Judge at Vinchur—Appeal to High Court—Regulation IV of 1827, s. 99—Regulation XIII of 1830, s. 5—Civil Procedure Code (Act V of 1908), ss. 4 and 100.* A special appeal, on the grounds mentioned in s. 100 of the Civil Procedure Code (Act V of 1908), lies to the High Court, from the dicision of the Civil Judge at Vinchur. RAMCHANDRA ANANDRAO *v.* PANDU (1913) . . . **I. L. R. 38 Bom. 340**

SPECIAL LEAVE TO APPEAL.

See PRIVY COUNCIL, PRACTICE OF.
I. L. R. 41 Calc. 568

SPECIAL OR SECOND APPEAL.

——— *Second Appeal in cases under Madras Rent Recovery Act VIII of 1865), s. 69—Civil Procedure Code (Act VIII of 1859), s. 379—Civil Procedure Code (Act XIV of 1882), s. 584—Concurrent findings of fact—High Court ignoring concurrent findings and deciding contrary to them on Second Appeal.* Although s. 69 of the Madras Rent Recovery Act (VIII of 1865) only provides

SPECIAL OR SECOND APPEAL—*concld.*

for a regular appeal (on law and fact), and there is no further appeal to the High Court from the decision of the District Judge on appeal from the Collector given by the terms of the Act itself, yet under s. 372 of Act VIII of 1859 which was the Civil Procedure Code in force when Madras Act VIII of 1865 was passed, and which regulated the procedure of the Civil Courts in India outside the Presidency towns, a special appeal lay "to the Sudder Court from all decisions passed in regular appeal by the Courts subordinate to the Sudder Court"; and when the District Court was substituted for the Zillah Court and the High Court for the Sudder Court a special appeal lay from the District Court to the High Court. The terms of the latter Civil Procedure Code (Act XIV of 1882) which was the Code in force when the suits out of which the present appeals arose, were instituted are clear on the point that an appeal lies from the order of the District Judge to the High Court unless that right is taken away by express legislation or some express provision of law. And a second or special appeal to the High Court in cases arising under Madras Act VIII of 1865 has been held to lie in *Veeraswamy* v. *Manager, Pittapur Estate, I. L. R. 26 Mad. 518.* The practice has been ever since the passing of the Act for such appeals to be preferred to the High Court, and their Lordships would not be disposed to interfere with such a long standing practice even if they thought there was an implied rule against second appeals lying from the decisions of the District Judge with respect to adjudications under the Act by the Collector. S. 584 of the Code of Civil Procedure, 1882, distinctly prohibits second appeals on questions of fact, and confines the competency of the High Court to deal with law and procedure. Where, therefore, in a suit by a landlord under s. 9 of the Madras Act VIII of 1865, to enforce acceptance of a patta by his tenants, and the sole question was whether on the evidence an arrangement which had been previously come to between the parties was permanent, and the Collector and the District Judge concurrently found in the defendant's favour that it was permanent, but the High Court on second appeal ignored that finding and held that the landlord was entitled to revert to a system of rates which had existed prior to such arrangement: *Held,* that the High Court had acted in inadvertence of s. 584 of the Code, and had thereby assumed a jurisdiction which it did not possess, and its decision was set aside and the case remitted to India. *Durga Chowdhurani* v. *Jewahir Singh Chowdhuri, I. L. R. 18 Calc. 23, s. c., L. R. 17 I. A. 122,* followed. RAVI VEERARAGHAVULU *v.* VENKATA NARASIMHA NAIDU BAHADUR (1914).

I. L. R. 37 Mad. 443

SPECIFIC PERFORMANCE.

1. ——— *Specific Relief Act (I of 1877), s. 22, sub-s. (2)—Compensation for money spent on improvements, refused to subsequent purchaser with notice of prior contract—Transfer of Property Act (IV of 1882), s. 55, sub-s. (1) cl. (b).*

SPECIFIC PERFORMANCE—*contd.*

On the 22nd April 1910, the first defendant entered into an agreement with the plaintiff to transfer to him a certain house and received Rs. 510 as earnest money, the transaction to be completed within 3 months. The first defendant also undertook to satisfy the purchaser that she had a valid saleable interest in the property by showing the will of her mother and other papers relating to the property. On 15th July 1910, plaintiff called upon the first defendant to send him the title-deeds, etc., and on the 21st July (*i.e.,* the day previous to the latest day) plaintiff notified the first defendant that he was ready with the purchase money. A draft will and some of the title deeds only were produced. On the 30th August 1910, the second defendant (who had notice of this prior contract) purchased the property in suit from the first defendant in the name of his wife, the third defendant. The Civil Courts were closed from the 2nd October to 3rd November. On the 5th November 1910, plaintiff commenced this action for specific performance, after the second defendant had spent nearly Rs. 900 on repairs: *Held,* that the plaintiff was entitled to have the contract specifically enforced not only against that vendor but also against the transferee who was not a *bonâ fide* purchaser for value without notice. *Held,* also, that there was no precedent for a delay of one month in the institution of a suit being sufficient to justify a refusal of relief by way of specific performance. *Glassbrook* v. *Richardson, 23 W. R. (Eng.) 51,* approved. *Held,* also, that sub-s. (2) of s. 22 of the Specific Relief Act clearly contemplated a case in which the vendor had entered into a contract *without* full knowledge of the circumstances. But where the hardship had been brought upon the subsequent purchaser by himself, the Court would not consider that as a circumstance in favour of the refusal of specific performance. *Kandarpa Nath Ghosh* v. *Jogendra Nath Ghosh, 12 C. L. J. 391,* approved. *Held,* also, that the defendant had not established any right to be reimbursed for the improvement made on the property. *Clare Hall* v. *Harding, 6 Hare 273, Monro* v. *Taylor, 8 Hare 51,* referred to. *Held,* also, that a copy of a compromise petition between the parties to probate proceedings cannot be accepted in lieu of a certified copy of the will (the contract being to show the will to the purchaser). *Oxford* v. *Provand, L. R. 2 P. C. 135, Lamare* v. *Dixon, L. R. 6 H. L. 414,* distinguished. HARADHAN DEBNATH *v.* BHAGABATI DASI (1914).

I. L. R. 41 Calc. 852

2. ——— *Specific performance, suit for, declaration that certain proceedings in Court held at plaintiff's instance were fictitious and of no effect—Circumstances disentitling plaintiff to protection in Court of equity—Circumstances entitling fraudulent confederate to retain property transferred to him in order to effect a fraud—Civil Procedure Code (Act XIV of 1882), s. 317, if applies where suit fictitious—Agreement by fictitious decree-holder-purchaser to restore land—Suit if for specific performance—Limitation.* The plaintiff as tenant held some lands under one *K* who in 1894 unsuccessfully sued to eject him

SPECIFIC PERFORMANCE—*concld.*

as a trespasser. In this litigation the plaintiff was assisted by one *J* in whose favour he executed a fictitious conveyance in 1898. In 1899 finding that *J* was unfaithful, plaintiff induced *K* to institute a fictitious suit for rent which was decreed on the 7th November 1899. *K* took out execution of this decree and at the sale which followed purchased the holding on the 19th March 1900. According to plaintiff's allegation *K* had agreed to execute a release of the holding in his favour, and although possession was formally delivered to *K* on 5th June 1900. Plaintiff continued in occupation of the land. In November 1906 *K* with the help of the Police took away the crops raised by the plaintiff and on the 15th March 1907 plaintiff brought a suit for declaration that the entire proceedings in the rent-suit of 1899 were fictitious and also for confirmation of his possession of the land : *Held*, that the suit was not one for specific performance of a contract and was not barred by limitation. That the case fell within the principle of the decision of the High Court in *Jadu Nath Poddar* v. *Rup Lal Poddar, I. L. R. 33 Calc. 967*, and of the Judicial Committee in *Pethperpermal Chetty* v. *Muniandy Servai, I. L. R. 35 Calc. 551*, namely, that to enable a fraudulent confederate to retain property transferred to him in order to effect a fraud the contemplated fraud must be effected, when and when alone does the fraudulent grantor or giver lose the right to claim the aid of the law to recover the property he has parted with and the plaintiff was not disentitled to protection in a Court of equity. That s. 317 of the Civil Procedure Code of 1882 did not apply to the present case. S. 317, Civil Procedure Code, contemplates a real sale in execution of a real decree in a real suit. AKHIL PRODHAN *v.* MANMATHA NATH KAR (1913) . **18 C. W. N. 1331**

SPECIFIC RELIEF ACT (I OF 1877).

——— **s. 9**—*Possessory title—Suit for recovery of possession—Plaintiff in actual possession without title ousted by defendants having no title at all. Held*, that the purchasers of a house and site in a village who had actually held possession for some years, but who had otherwise no title, were entitled to succeed in a suit for recovery of possession as against persons who had in fact ousted them but could show no title at all to the possession of the house or site. *Wali Ahmad Khan* v. *Ajudhia Kundu, I. L. R. 13 All. 537*, and *Lachhman* v. *Shambhu Narain, I. L. R. 33 All. 174*, referred to. UMRAO SINGH *v.* RAMJI DAS (1913).
I. L. R. 36 All. 51

——— **s. 15**—*Contract by managing-member of joint Hindu family under circumstances not binding on the other members—Right to specific performance—Hindu Law.* Where the managing member of a joint Hindu family consisting of himself and his sons, some of whom were majors, entered into a contract to sell family lands to the plaintiff, under such circumstances, that the contract was held not binding on the sons : *Held*, in a suit for specific performance against both the father and the sons composing the joint family, that under s. 15 of the Specific Relief Act, the plaintiff was not entitled to a decree even as against the father. S. 15 applies to a case where a member of an undivided family agrees to sell part of the joint property in which he has only a share ; and the circumstance that an undivided father has an interest in every portion of the undivided property does not take the case out of the operation of the section. *Kosuri Ramaraju* v. *Ivalury Ramalingam, I. L. R. 26 Mad. 74*, and *Srinivasa Reddi* v. *Sivarama Reddi, I. L. R. 32 Mad. 320*, not followed. *Poraka Subbarami Reddi* v. *Vadlamudi Seshachalam Chetty, I. L. R. 33 Mad. 359, Govinda Naicken* v. *Apathsahaya Iyer, Mad. W. N. 87*, and *Barrett* v. *Ring, 2 Sm. & Giff. 43 ; s.c., 65 E. R. 294*, referred to. NAGIAH *v.* VENKATARAMA SASTRULU (1912).
I. L. R. 37 Mad. 387

SPECIFIC RELIEF ACT (I OF 1877)—*contd.*

——— **s. 15**—*concld.*

——— **ss. 15 and 17**—*Contract by one co-owner to sell property belonging to him in common with another—Not enforceable—Delay, effect of.* Where one of two divided brothers of a Hindu family agreed to sell immoveable property held by them in common, and a suit was brought for specific performance of the contract by compelling the vendor to execute a deed of sale in respect of the whole of the property agreed to be sold : *Held*, that no specific performance could be granted, as the execution of a sale deed by the defendant would be ineffectual in respect of the moiety not belonging to him ; the Court would not lend its sanction to a transaction devoid of legal effect and improper in itself as calculated to throw a cloud on the title of a third person which would give him a cause of action for a declaratory suit. *Poraka Subbarami Reddy* v. *Vadlamudi Seshachalam Chetty, I. L. R. 33 Mad. 359*, referred to. *Kosuri Ramaraju* v. *Ivalury Ramalingam, I. L. R. 26 Mad. 74, Srinivasa Reddi* v. *Sivarama Reddi, I. L. R. 32 Mad. 320*, and *Barrett* v. *Ring, 2 Sm. & G. 43 ; s.c. 65 E. R. 294*, distinguished. S. 17 of the Specific Relief Act prohibits the Court from directing specific performance of a part of a contract except in accordance with the preceding sections. Even in a case falling within s. 15, the relief by way of a decree for part performance is discretionary and will not be granted where there has been great delay, and a consequent change of circumstances. GOVINDA NAICKEN *v.* APATHSAHAYA IYER (1912) . . **I. L. R. 37 Mad. 403**

——— **ss. 21** (*b*), **54.**

See TRUST . . **I. L. R. 41 Calc. 19**

——— **s. 22**—*Contract for sale of land in lieu of hushing up of departmental enquiry against a public servant, if enforceable—Court of equity, jurisdiction of, to refuse specific performance of contract not invalid or void under the Indian Contract Act.* In a suit for specific performance of a contract for sale of land, it appeared that in consequence of a charge being laid at the instance of the plaintiffs against one of the defendants who was the record-keeper of the Court of the District Judge a departmental

SPECIFIC RELIEF ACT (I OF 1877)—*contd.*

——— **s. 22**—*concld.*

enquiry into the matter by a Subordinate Judge was ordered and while this was in progress the two defendants who were father and son were approached by the plaintiffs who promised to hush up the said enquiry if the defendants would execute a conveyance in their favour in respect of certain land and the result was the contract in suit: *Held*, that the contract was one of which specific performance ought not to be ordered. That there may be cases which cannot be brought within the four corners of any of the provisions of the Indian Contract Act as to the invalidity or voidability of agreements but in which nevertheless a Court of equity may properly refuse to exercise its jurisdiction under the Specific Relief Act. GOBINDA CHANDRA CHACKERBUTTY *v.* NANDA KUMAR DAS (1914) . . . . . **18 C. W. N. 689**

——— **s. 22, Sub-s.** (*2*)—

See SPECIFIC PERFORMANCE.

I. L. R. 41 Calc. 852

——— **s. 27**—*Transferee for value from lessor with constructive notice of agreement for renewal in favour of lessee—Constructive notice—Possession of tenant, notice of covenants —Specific performance.* Occupation of property by a tenant ordinarily affects one who would take a transfer of that property with notice of that tenant's rights and if he chooses to make no enquiry of the tenant he cannot claim to be transferee without notice. Where on 11-7-06, during the currency of a *jalkar* lease for seven years executed by the owners in favour of the defendants on 2-3-1901, the plaintiffs took a settlement of the *jalkar* from the lessor for a term of seven years from 1-5-08 on payment of a sum of Rs. 600, and on the expiry of the defendants' term sued them for recovery of possession of the *jalkar*: *Held*, that an agreement for renewal of their lease upon certain conditions, made between the defendants and their lessors on 1-5-01 was specifically enforceable by them against the plaintiffs who claimed title under the lessors and were affected with notice of the agreement of 1-5-01. That plaintiffs could not consequently recover. BABURAM BAG *v.* MOHADEB CHANDRA PALLAY (1913) . . . **18 C. W. N. 341**

——— **s. 42**—

See ELECTION . **I. L. R. 41 Calc. 384**

See PENAL ASSESSMENT.

I. L. R. 37 Mad. 298

1. ——— *Joint Hindu family—Widow alleged to be in possession of part of the joint property under a family agreement—Suit for declaration of rights of other members of the family.* Under a deed of compromise, the name of the widow of a member of a joint Hindu family was entered in the place of that of her husband and she was put in possession of the property that stood in his name. On an application being made for partition of one of the villages, the widow also applied for partition of the share which stood in her name. The plaintiffs objected on the ground that she was not entitled to partition, and they were referred to the Civil Court to have their rights established. They then sued for a declaration that the deceased died while living jointly with themselves, that the widow was not in possession as the heir of the deceased, and that she was not entitled to obtain partition. S. 42 of the Specific Relief Act was set up in defence. *Held*, that inasmuch as the possession of the defendant was clearly admitted and the real dispute between the parties was one to the nature of the possession of the widow, s. 42 of the Specific Relief Act did not bar a suit for declaration of title. RAM MANORATH SINGH *v.* DILRAJI KUNWAR (1913).

I. L. R. 36 All. 126

SPECIFIC RELIEF ACT (I OF 1877)—*concld.*

——— **s. 42**—*concld.*

2. ——— *Suit for declaration of title—Waste land—Plaintiff out of possession. Held*, that the fact that land was waste land and therefore of no immediate practical use was no bar to the application of s. 42 of the Specific Relief Act, where the plaintiff, being admittedly out of possession, claimed only a declaration of his title. *Ramanuja* v. *Devanayaka*, *I. L. R. 8 Mad. 361*, distinguished. ISHWARI SINGH *v.* NARAIN DAT (1914) . . . **I. L. R. 36 All. 312**

3. ——— *Assignee from tenant, if may sue landlord for recognition of his tenant rights and declaration of incidents of tenancy—Landlord and tenant.* The Court has power to pass a declatory decree in a suit by an assignee of a lease against the lessor to have it declared that the lease is a permanent, heritable and transferable one, that the rent was fixed in perpetuity and that the lessor was bound to recognise the plaintiff as tenant of the leasehold. The law laid down in earlier rulings to the contrary has been modified by s. 42 of the Specific Relief Act. MONMOHAN GHOSH *v.* EQUITABLE COAL COMPANY, LD. (1913).

18 C. W. N. 596

——— **s. 45.**

See UNIVERSITY LECTURERSHIP.

I. L. R. 41 Calc. 518

——— **s. 56,** *Ill.* (1)—*Suit for injunction, if lies against trespasser.* A plaintiff who is out of possession should not be allowed to sue the defendant who is alleged to be in possession as a trespasser for an injunction. He ought to sue for recovery of the land. JAHAR LAL BANDURI *v.* NANDA LAL CHAUDHURI (1913).

18 C. W. N. 545

SPES SUCCESSIONIS.

See HINDU LAW—WIDOW.

I. L. R. 38 Bom. 224

——— **transfer of**—

See KHOJAS. . **I. L. R. 38 Bom. 449**

STAMP.

See CIVIL PROCEDURE CODE (1908), SS. 107, 149; O. VII, R. 11, CL. (*c*).

I. L. R. 38 Bom. 41

STAMP—*concld.*

See STAMP ACT (II OF 1899).
I. L. R. 36 All. 137

STAMP ACT (II OF 1899).

——— **s. 2 (*14*); Sch. I, Art. 5.**
I. L. R. 36 All. 11

——— : *'Instrument"—Entry in register as to hiring certain machinery attested by thumb marks of hirers—Memorandum of agreement.—Stamp.* In a book kept by the owner of certain machinery for the manufacture of sugar which purported to be a register of sums payable with respect to the letting out of wooden machines (*charkhi*) and rollers for pressing sugarcane and iron pans for boiling sugarcane juice was an entry to the following effect—"Harkesh, son of Kunwar, and two others, residents of mauza Salempur, hired a sugarcane pressing machine in consideration of a rent of Rs. 15 from the plaintiff through his *karinda* (named), that they would pay the hire in *Chait*, and in default would pay interest at 2 per cent. per mensem." Below this entry were the thumb marks of the persons who hired the machine. *Held*, that this entry amounted to an "instrument" as defined in s. 2, sub-s. (*14*) of the Indian Stamp Act, 1899, and was a memorandum of agreement within the terms of article 5 (*b*) of the first schedule to that Act. *Mulchand Lala* v. *Kashibullav Biswas, I. L. R. 35 Calc. 111*, referred to. MUTASADDI LAL *v.* HARKESH (1913).
I. L. R. 36 All. 11

——— **s. 2 (*15*); Sch. I, Art. 45 (*c*)—**

——— *Stamp—Partition—"Final order for effecting a partition."* *Held*, that the words "final order" in s. 2, cl. (*15*), and article 45 (*c*) of sch. I to the Indian Stamp Act, 1899, referred to the final order of the lowest Court of original jurisdiction empowered to give an order for effecting a partition at the time it is passed. STAMP REFERENCE BY BOARD OF REVENUE (1914).
I. L. R. 36 All. 137

——— **s. 36.**

See SUCCESSION ACT (X OF 1865), S. 190.
I. L. R. 38 Bom. 618

——— *Unstamped acknowledgment accepted as evidence by trial Court, if may be rejected on appeal.* A statement to the effect as follows: "Rs. 2,115—balance due" followed by the date and the debtor's signature is an acknowledgment and should be stamped as such. But under s. 36 of the Stamp Act if such a statement, though unstamped, has been admitted in evidence by the Court of first instance, it cannot be rejected by the Appellate Court. SITARAM *v.* RAMA PROSAD RAM (1913). . . . . **18 C. W. N. 697**

——— **Sch. I, Art. 15.**

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), S. 269. **I. L. R. 37 Mad. 17**

——— **Sch. 1, Art. 22,** *Registration Act (III of 1877), s. 17, cl. (e)—Trusts Act (II of 1882), s. 5—"Composition deed"—Compounding of debts due—*

STAMP ACT (II OF 1899)—*concld.*

——— **Sch. I, Art. 22**—*concld.*

Transfer of immoveable property—Registration not necessary. With the consent of creditors to the extent of Rs. 1,22,000 out of the total number of creditors claiming Rs. 1,61,800 of the family firm represented by one B, the latter executed a deed making over all the specified assets of the family to certain nominated trustees. The creditors coming in (by a particular day) under the deed agreed that after all the goods and the properties had been made over to the trustees no other claim whatever with regard to the amounts due to them should remain outstanding against B and the minor members of the family, but the whole claim should be understood to be written off against them, and B and the minors were to make use of the deed as a release passed on their behalf. The deed also provided that the trustees were to manage the properties for the benefit of the creditors interested and the monies realized from time to time were to be distributed among such creditors in proportion to their claims. The properties comprised in the deed, moveable as well as immoveable, were transferred to the trustees in due course. The deed was unregistered. Subsequently in a suit brought by the trustees to recover possession of a house comprised in the deed, a question having arisen whether the deed was a composition deed: *Held*, that the definition of the term "composition deed" as given in Art. 22, Sch. I of the Stamp Act (II of 1899), meant the same thing as the term "composition deed" in s. 17 of the Registration Act (III of 1877), that the term so defined covered three classes of instruments: (i) An assignment for the benefit of creditors; (ii) an agreement whereby payment of a composition or dividend was secured to the creditors; and (iii) an inspectorship deed for the purpose of working the debtor's business for the benefit of his creditors, that the inclusion of the term "composition deed" in s. 17 of the Registration Act (III of 1877) showed that it was intended to apply to a transfer of immoveable property and not to a mere agreement to take fractional payment of money in settlement of claims, that the test of a "composition deed" was that there ought to be a compounding of debts due and that such a deed fell under cl. (*e*) of s. 17 of the Registration Act (III of 1877) and did not require registration under that Act nor under the provisions of s. 5 of the Trusts Act (II of 1882). *Held*, accordingly, that the deed in question was 'a composition deed' within the meaning of s. 17, cl. 2, of the Registration Act (III of 1877), and did not require registration. CHANDRASHANKAR *v.* BAI MAGAN (1914).
I. L. R. 38 Bom. 576

STATEMENT ON INFORMATION AND BELIEF.

See CONTEMPT OF COURT.
I. L. R. 41 Calc. 173

STATUTE, CONSTRUCTION OF.

See MADRAS HEREDITARY VILLAGE OFFICES ACT (III OF 1895).
I. L. R. 37 Mad. 548

STATUTES.

———— **24 & 25 Vic. c. 104, ss. 1, 2**—*Power of Crown to appoint a sixth Puisne Judge—Criminal Procedure Code, s. 417—Appeal from acquittal—Procedure. Held*, on a construction of ss. 1 and 2 of Letters Patent of the High Court for the North-Western Provinces, that it was competent to the Crown to appoint by means of its Letters Patent a sixth puisne Judge to the said High Court. *Held*, also, following the decision of *Queen-Empress* v. *Prag Dat, I. L. R. 20 All. 459*, that in the Code of Criminal Procedure there is no apparent distinction between the right of appeal against an acquittal and the right of appeal against a conviction. *Queen-Empress* v. *Robinson, I. L. R. 16 All. 212*, referred to. EMPEROR *v.* GHURE (1914).
I. L. R. 36 All. 168

STAY OF EXECUTION.

See APPEAL . **I. L. R. 41 Calc. 160**

STAY OF HEARING.

———— **of suit—**

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXIII, R. 3, SCH. II, CLS. 1-16 . . **I. L. R. 38 Bom. 687**

STEP IN AID OF EXECUTION.

See LIMITATION ACT (IX OF 1908), S. 19, SCH. I, ART. 182, CL. 5.
I. L. R. 38 Bom. 47

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 182 . **I. L. R. 36 All. 439**

STEP-MOTHER.

See HINDU LAW—SUCCESSION.
I. L. R. 37 Mad. 286

STOPPAGE IN TRANSIT.

See CONTRACT ACT (IX OF 1872), SS. 4, 61, 103. . **I. L. R. 38 Bom. 255**

STRIDHAN.

See HINDU LAW—STRIDHAN.

STRUCTURE (TEMPORARY).

See EASEMENT . **I. L. R. 37 Mad. 527**

SUB-LEASE.

See BUSTEE LAND.
I. L. R. 41 Calc. 164

SUBSTITUTION.

———— *Execution of decree—Claim against deceased debtor decreed against alleged adopted son represented by deceased's widow as guardian—Adoption set aside before execution—Execution if may be had against widow. A* who had a claim against *B*, on *B's* death sued *C*, an infant alleged to be the adopted son of *B*, *B's* widow *D* being appointed guardian *ad litem* of *C*, and obtained a decree. Before execution was taken out, it was declared in a separate suit that *C* had not been validly adopted. *A* then applied for substitution of *D* in the place of *C* and for execution against *D*: *Held*, that *D* was not bound by the decree, and it

SUBSTITUTION—*concld.*

was not competent to execute the decree against *D*. ASHI BHUSAN DASI *v.* PELARAM MONDOL (1913) . . . . **18 C. W. N. 173**

SUCCESSION.

See AGRA TENANCY ACT (II OF 1901), SS. 95, 167 . **I. L. R. 36 All. 48**

See BURMESE LAW—SISTERS.
I. L. R. 41 Calc. 887

See HINDU LAW—SUCCESSION.

———— **order of, according to Mitakshara—**

See HINDU LAW—STRIDHAN.
I. L. R. 37 Mad. 293

SUCCESSION ACT (X OF 1865).

———— **s. 107 part XV—**

See HINDU LAW—WILL.
I. L. R. 41 Calc. 642

———— **s. 190**—*Letters of administration obtained by plaintiff after suit filed but before hearing and decree—Transfer of Property Act (IV of 1882), s. 130—Order to banker to pay money held to the credit of customer, effect of when acted on—Stamp Act (II of 1899), s. 36—Resulting trust.* One *W* had a deposit of Rs. 10,500 in a bank under a deposit receipt which fell due on the 7th of August 1912. *W* had a grand-nephew *H*, to whom he wished to transfer the money, meaning that *H* should have the benefit of the money, but not intending that he should be able to make away with the money in *W's* life-time or to draw the interest without making due provision for *W's* maintenance. On the 8th of August 1912, *W* handed to *H* his deposit receipt duly endorsed and a letter to the following effect:—"I hereby state that I have found my Bank Receipt. Herewith I am forwarding the same for the interest now due. "I wish it to be handed over to my nephew. I also wish you to hand over the amount of Rs. 10,500 which is in fixed deposit to my nephew, *Wilmot Charles Harrison*, to his account." *H* took these documents to the bank and asked for and obtained a new deposit receipt for Rs. 10,000, the balance of Rs. 500 in cash and Rs. 420 in cash by way of interest. On the 18th of October 1912, *W* died. On the 5th of August 1913, G, a grand-niece of *W*, filed a suit against *H* as administratrix of the estate of W, claiming that the sum deposited with the bank, in the plaint stated to be Rs. 10,000, formed part of the estate of *W* and that the plaintiff, as administratrix of his estate, was entitled to the same. At the date of the filing of the suit *G* had not obtained Letters of Administration to *W's* estate but did obtain them before the hearing of the suit. *Held*, that the plaint was defective in that it did not show that the plaintiff had obtained Letters of Administration, and should on that account have been rejected on presentation, but that as the plaintiff had obtained Letters of Administration before the hearing and the hearing had been allowed to proceed, a decree passed in favour of the plaintiff was not contrary to s. 190

SUCCESSION ACT (ACT X OF 1865)—*concld.*

——— **s. 190**—*concld.*

of the Indian Succession Act. *Held*, further, that where money mentioned in a deposit receipt was immediately payable and the receipt was presented duly endorsed together with an order to pay a given individual, that individual became the owner of the money upon payment by the banker or upon his promise to hold the money at the disposal of the payee, that an order on a banker to pay money which he held to the credit of a customer was not an assignment of a debt, but an authority to deliver property, which, if acted on, was equivalent to delivery by the customer, and that the letter of the 8th of August 1912 was such an order and had been acted on and though had an objection been taken at the hearing before the lower Court it might have been rejected for want of a stamp that such an objection could not be taken on appeal, the letter being on record. *Held*, further, that the intention of the donor, *W*, to benefit negatived the idea of any resulting trust in his favour. SETHNA *v.* HEMINGWAY (1914) . **I. L. R. 38 Bom. 618**

SUCCESSION CERTIFICATE ACT (VII OF 1889)

——— **s. 4**—

1. ——— *Succession certificate—Assignment of debt covered by certificate—Certificate also made over to assignees—Rights of assignees.* The widow of a separated Hindu obtained a certificate of succession for the collection of a debt due to her deceased husband. She assigned the debt and also handed over the succession certificate to the assignees. *Held*, that the assignees were competent to sue and get a decree for the debt. The widow could undoubtedly assign the debt, and it was not necessary, even if it were possible, for the assignees to obtain cancellation of the certificate granted to the widow and the issue of a fresh certificate in their favour. *Karuppasami* v. *Pichu, I. L. R. 15 Mad. 419*, distinguished. *Allahdad Khan* v. *Sant Ram, I. L. R. 35 All. 74*, not followed, *Durga Kunwar* v. *Matu Mal, I. L. R. 35 All. 311*, referred to. RANG LAL *v.* ANNU LAL (1913) . . . . **I. L. R. 36 All. 21**

2. ——— *Application for certificate—Applicant alleging himself to be joint with deceased and entitled to his estate by survivorship.* Where an applicant for a succession certificate stated in his application that he was a member of a joint Hindu family with the deceased to whose estate he had succeeded by survivorship: *Held*, that a succession certificate was unnecessary and the application must fail. MATHURA PRASAD *v.* DURGAWATI (1914) . **I. L. R. 36 All. 380**

3. ——— *Debt, part of, certificate in respect of, if may be granted—Multiplicity of suits.* A certificate under Act VII of 1889 (Succession Certificate Act) can be granted in respect of a portion of a debt. The principle of law, which prohibits a multiplicity of suits, is in no way affected by the grant of certificates in respect of fractional shares of a debt. *Bibee Boodhun* v. *Jan Khan, 13 W. R. 265, Muhammad Ali Khan* v. *Puttan Bibi, I. L. R. 19 All. 129, Bismilla Begam*, v. *Tawassul Hussain, I. L. R. 32 All. 335, Ghafur Khan* v. *Kalandari Begam, I. L. R. 33 All. 327, Akbar Khan* v. *Bilkisara Begam, All. W. N. for 1901, 125, In the matter of the petition of Ghansham Das, All. W. N. for 1893, 84, Mohamed Abdul, Hossein* v. *Sarifan, 16 C. W. N. 231*, referred to. ANNAPURNA DASSY *v.* NALINI MOHAN DAS (1914).

18 C.. W. N. 836

SUCCESSION CERTIFICATE ACT (VII OF 1889)—*concld.*

——— **s. 4**—*concld.*

——— **ss. 16, 18**—*Certificate of succession—Suit to set aside certificate and decree passed in favour of the holder.* A succession certificate granted under the provisions of the Succession Certificate Act, 1889, is conclusive as against the debtor under s. 16 of the Act, and it can be revoked by the District Judge only under s. 18 of the Act. No suit will lie to have a succession certificate and a decree obtained by the holder thereof set aside on the mere ground that the certificate was obtained by the use of false evidence. RUPAN BIBI v. BHAGELU LAL (1914) **I. L. R. 36 All. 423**

SUDDER DEWANY ADAWLAT.

See CONTEMPT OF COURT.

I. L. R. 41 Calc. 173

SUDDER NIZAMUT ADAWLAT.

See CONTEMPT OF COURT.

I. L. R. 41 Calc. 173

SUICIDE.

——— **abetment of—**

See PENAL CODE (ACT XLV OF 1860), S. 306 . . **I. L. R. 36 All. 26**

——— **by prisoner on bail—**

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), S. 514 (*5*).

I. L. R. 37 Mad. 156

SUITS VALUATION ACT (VII OF 1887).

——— **s. 11.**

See CIVIL PROCEDURE CODE (1908), S. 104; O. XLIII, R. 10(*a*).

I. L. R. 36 All. 58

SUMMARY PROCEEDINGS.

See CONTEMPT OF COURT.

I. L. R. 41 Calc. 173

See PROFESSIONAL MISCONDUCT.

I. L. R. 41 Calc. 113

SUMMARY SETTLEMENT.

See INAM LANDS.

I. L. R. 38 Bom. 272

SUMMARY TRIAL.

——— *Warrant Case—Omission to examine the accused—Charge—Accusation of house-breaking by night to commit theft—Finding of different intent—Necessity of charge specifying the*

SUMMARY TRIAL—*concld.*

same—Criminal Procedure Code (Act V of 1898), ss. 263, 342. S. 263 of the Criminal Procedure Code is governed by s. 342, and there must, therefore, be an examination of the accused in all warrant cases: the words "if any" in cl. (*g*) of the former section, not being applicable to such cases. Where the case against the accused is one of theft or house-breaking to commit theft, and the Magistrate finds that it has broken down but that there is another object apparent on the evidence, it is his duty to give the accused notice of that by drawing up a charge clearly stating what it is that he is accused of doing. MAHOMED HOSSAIN *v.* EMPEROR (1914). . . **I. L. R. 41 Calc. 743**

SUMMONS.

———— **to accused to produce document or thing.**

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), S. 94 **I. L. R. 37 Mad. 112**

SUNNIS.

See MAHOMEDAN LAW—DIVORCE.
I. L. R. 36 All. 458

SUPERINTENDENT.

See TRUST . **I. L. R. 41 Calc. 19**

SUPPLEMENTARY AFFIDAVIT.

See CONTEMPT OF COURT.
I. L. R. 41 Calc. 173

SUPPORT.

———— **right of, for a building—**

See EASEMENT **I. L. R. 37 Mad. 527**

SUPREME COURT.

See CONTEMPT OF COURT.
I. L. R. 41 Calc. 173

SURETY.

———— **discharge of—**

See EXECUTION OF DECREE.
I. L. R. 41 Calc. 50

1. ———— *Fitness—Grounds of rejection of sureties—Reasonableness of grounds—Pecuniary fitness—Want of control over principal—Criminal Procedure Code (Act V of 1898), s. 122.* The grounds on which a Magistrate has power to refuse to accept a security, under s. 122 of the Criminal Procedure Code, must be such as are valid and reasonable in the circumstances of each case as it arises. *In re Sooboddhee, 22 W. R. Cr. 37,* followed. *Ram Pershad* v. *King-Emperor, 6 C. W. N. 593,* and *Adam Sheikh* v. *Emperor, I. L. R. 35 Calc. 400,* commented on. *Jalil* v. *Emperor, 13 C. W. N. 80, Jafar Ali Panjalia* v. *Emperor, I. L. R. 37 Calc. 446* referred to. Where the Magistrate found that the sureties, who were the brothers of a person bound down under s. 110 of the Code, were pecuniarily fit, but that the latter was a notorious dacoit and that there was a consensus of opinion in the neighbourhood that they would not be able to keep him in control: *Held,* that the ground of their rejection was not unreasonable in the circumstances. EMPEROR *v.* ASIRADDI MANDAL (1914).
I. L. R. 41 Calc. 764

SURETY—*concld.*

2. ———— *Surety for an administrator of estate, if may be discharged or substituted—Surety, creating charge on his immoveable property, release of charge—Surety bond, discharge of and substitution—Administration account, if may be examined by Court.* Letters of Administration were granted to the estate of the deceased *K*, a Hindu governed by the Dayabhaga law, to *R* one of his first cousins who for purposes of such administration was also appointed guardian of deceased's infant son, and *R*'s two brothers stood surety for the administrator. The estate being a very large one the Court required the sureties to charge their immoveable properties in the surety bond besides making them personally liable. The infant having died without issue and intestate, his paternal grandmother succeeded to the estate as his heir. *R* thereupon applied to Court stating that he had tendered an account of the estate as administered by him to the lady and that she had the same examined by her constituted attorneys and that they were satisfied with the account and that the residue of the estate had been made over to her and prayed that the sureties be discharged and the charge on their immoveable property be also discharged. The Court ordered that on the lady's constituted attorneys filing a verified certificate together with the account or abstract thereof stating that they had examined and found it correct, and on the administrator filing the receipts for the debts paid to the satisfaction of the Registrar, the surety bond creating a charge on the immoveable properties of the sureties would be discharged, conditional upon the sureties executing a fresh security bond making themselves personally liable for the administration of the estate by the petitioner. *Raj Narain Mukerjee* v. *Ful Kumari Devi, I. L. R. 29 Calc. 68,* referred to. The account of the administrator need not be investigated by the Court, there being no procedure or practice for doing so. KANAI LAL KHAN, *In the goods of* (1913) . . . . . **18 C. W. N. 320**

SURVIVORSHIP.

See CIVIL PROCEDURE CODE, O. XXXVIII, R. 5 . . **I. L. R. 38 Bom. 105**

SYMBOLICAL POSSESSION.

———— ———— *Effect as between parties—Presumption of continuance of possession, if conclusive.* Delivery of symbolical possession is conclusive evidence, as between the parties, that possession was delivered, but is not in the least conclusive evidence that the possession so delivered continued. There may be a presumption that such possession would continue until the contrary was proved, but that is all. Where it was found that the plaintiff to whom symbolical possession was delivered never got actual possession, the finding can only mean that the possession delivered did not continue at all, so that Art. 142, and not Art.

SYMBOLICAL POSSESSION—*concld.*

144, of the Limitation Act applied to the case. Where it appeared that the plaintiff had recovered rent decrees from raiyats within 12 years of the suit and the decrees were not open to question as collusive and fraudulent, the plaintiff's possession of the lands held by the raiyats through them within the statutory period of limitation was established. DEONANDAN PERSAD *v.* UDIT NARAIN SINGH (1914) . . . **18 C. W. N. 940**

T

TALUKDARI SETTLEMENT OFFICER.

See GUJRAT TALUKDARS' ACT (BOM. ACT VI OF 1888 AS AMENDED BY BOM. ACT II OF 1905), SS. 29, 29B (*1*), (*2*), (*3*) AND 29F . . **I. L. R. 38 Bom. 604**

TAXES.

See CANTONMENTS ACT (III OF 1880), S. 22. **I. L. R. 38 Bom. 293**

TEMPORARY INJUNCTION.

——————— *Conditions of grant of temporary injunction—Co-owners—Building by co-owner—Undue advantage—Revision by High Court—Charter Act (24 & 25 Vict., c. 104) s. 15.* Where plaintiffs who were joint owners with defendants in respect of the property in suit sued them for declaration of title thereto and applied for an injunction to restrain the defendants from building on the land, and the lower Appellate Court set aside the temporary injunction granted by the Court of first instance : *Held*, that sold occupation by one co-sharer did not necessarily constitute ouster of the other co-owners. But a co-owner who was, with the tacit or express consent of his co-sharer, in sole occupation of a portion of joint property, was not entitled to change the nature of that possession or to use the property in a mode different from that in which it had previously been used. *Dwijendra Narain Roy* v. *Purnendu Narain Roy, 11 C. L. J. 189*, followed. *Held*, further, that in granting an *interim* injunction what the Court had to determine was whether there was a fair and substantial question to be decided as to what the rights of the parties were. *Moran* v. *River Steam Navigation Co., 14 B. L. R. 352*, followed. The real point was, not how these questions ought to be decided at the hearing of the cause, but whether the nature and difficulty of the questions was such that it was proper that the injunction should be granted until the time for deciding them should arrive. *Walker* v. *Jones, L. R. 1 P. C. 50*, followed. *Held*, also, that under circumstances like these the matter for consideration at that stage was, where did the balance of convenience lie, was it desirable that the *status quo* should be maintained or was it right that defendants should be allowed to continue to alter the character of the land. *Jones* v. *Pacaya Rubber and Produce Company, Ld.*, [1911] *1 K. B. 455*, *Aynsley* v. *Glover, L. R. 18 Eq. 544, Currier's Company* v. *Corbett, 2 Drew & Sm. 355, Newson* v. *Pender, 27 Ch. D. 43*, referred to. *Held*, further, that in a case of this description (where a substantial portion of the building had been erected after the defendants had become aware of the institution of the suit and of the application for temporary injunction) the Court would, if necessary, proceed not only to grant a temporary injunction restraining the further erection of the building but also to direct that the building already erected be taken down. *Daniel* v. *Ferguson*, [*1891*] *2 Ch. 27, Von Joel* v. *Hornsey*, [*1895*] *2 Ch. 714*, referred to. *Held*, that the High Court was competent to interfere under s. 15 of the Charter Act (24 & 25 Vict., c. 104) in view of the conduct of the defendants which amounted to a defiance of the authority of the Court. ISRAIL *v.* SHAMSHER RAHMAN (1913).

I. L. R. 41 Calc. 436

TENANCY.

See RENT . **I. L. R. 41 Calc. 347**

——————— **From year to year**—*Determination of annual tenancy—Notice to quit.* Ordinarily, unless there is an express agreement for the expiry of a tenancy on a certain day, a tenancy from year to year is only determined by a notice to quit. SITARAM BHIMAJI *v.* SADHU (1913).

I. L. R. 38 Bom. 240

TENDER.

See TRANSFER OF PROPERTY ACT (IV OF 1882), S. 84 **I. L. R. 36 All. 139**

THAK SURVEY.

——————— *Decision of Survey authorities arrived at in the presence of parties concerned, value of, as evidence when acquiesced in by parties and made basis of important transactions—Such decision, if estoppel.* Where the question whether certain lands were included within a mahal was in 1849, in the course of a *Thak* survey, determined by the Survey authorities in a proceeding in which opportunity had been given to all parties interested of making their claims, raising their objections and producing their evidence : *Held*, that though the parties were not estopped by the decisions arrived at, these were obviously of high authority and when acquiesced in by all the parties interested for a length of time and made the basis of important transactions should not be disturbed unless upon the clearest proof that they were erroneous. SURJA KANTA ACHARJYA *v.* SARAT CHANDRA ROY CHOWDHURY (1914).

18 C. W. N. 1281

THEFT.

——————— *Penal Code (Act XLV of 1860), s. 370—Custom, plea of—Conviction under s. 379 unsustainable without the finding that the accused had no right to the subject-matter of the theft.* Where the accused is charged with theft he cannot be convicted of the offence of theft or of causing wrongful gain or wrongful loss without a clear

THEFT—*concld.*

finding that he had no right to the subject-matter of the theft. HARENDRA NARAYAN DAS *v.* RAMJAN KHAN (1913) . . . . **I. L. R. 41 Calc. 433**

TIME.

——— essence of contract—

See CONTRACT ACT (IX OF 1872), S. 55.
I. L. R. 38 Bom. 77

TITLE.

——— impeachment of—

See KHOTI SETTLEMENT ACT (BOM. ACT I OF 1880), SS. 9, 10.
I. L. R. 38 Bom. 709

——— suit for declaration of—

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 120 . . **I. L. R. 36 All. 492**

See SPECIFIC RELIEF ACT (I OF 1877), S. 42 . . **I. L. R. 36 All. 312**

——— *Possession, inference from as regards title.* Where plaintiff proves that he is in possession for a number of years and has been paying rent to the admitted landlord, the legal inference is that the plaintiff is in possession by virtue of a title derived from the landlord, although the plaintiff may have failed to prove the specific title on which he bases his claim. The plaintiff is entitled in such a case to a decree as against a defendant who has no title to possession. ADHAR CHANDRA PAL *v.* DIBAKAR BHUYAN (1913).
I. L. R. 41 Calc. 394

TITLE DEEDS.

deposit of—

See TRANSFER OF PROPERTY ACT (IV OF 1882), S. 59 **I. L. R. 38 Bom. 372**

TRANSFER.

See CRIMINAL PROCEDURE CODE, S. 17.
I. L. R. 36 All. 468

See CRIMINAL PROCEDURE CODE, S. 192.
I. L. R. 36 All. 166

See CRIMINAL PROCEDURE CODE, S. 349,
I. L. R. 38 Bom. 719

See CRIMINAL PROCEDURE CODE, SS. 350, 528 . . . **I. L. R. 36 All. 315**

See CRIMINAL PROCEDURE CODE, S. 526.
I. L. R. 36 All. 239

See CRIMINAL PROCEDURE CODE, S. 528.
I. L. R. 36 All. 513

——— of suit—

See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SS. 23, 27.
I. L. R. 38 Bom. 190

——— *Application for adjournment to move the High Court for transfer—"Criminal case," meaning of—Proceedings for security to keep the peace—Criminal Procedure Code (Act V of 1898), ss. 107, 526 (8).* A proceeding under s. 107 of the Criminal Procedure Code is a " criminal case," and is subject to the application of cl. (8) of s. 526. WAZED ALI KHAN *v.* EMPEROR (1913).
I. L. R. 41 Calc. 719

TRANSFER—*concld.*

TRANSFER OF PROPERTY.

——— to the jurisdiction of another Court—

See CIVIL PROCEDURE CODE (ACT V OF 1908), SS. 37, 38 AND 150.
I. L. R. 37 Mad. 462

TRANSFER OF PROPERTY ACT (IV OF 1882).

——— ss. 3 and 136.

See LEGAL PRACTITIONER'S ACT (XVIII OF 1879), S. 13.
I. L. R. 37 Mad. 238

——— s. 41—*Ostensible owner—Finding as to question of fact—Second appeal. Held,* that the questions whether a person in apparent possession of immoveable property is the " ostensible owner " with the consent, express or implied, of the real owner, within the meaning of s. 41 of the Transfer of Property Act, 1882, and whether a transferee from such a person took the transfer *bonâ fide* after taking reasonable care to ascertain the title of his transferor, are questions of fact, the finding on which, by the lower Appellate Court, cannot be disturbed in second appeal. JAMNA DAS *v.* UMA SHANKAR (1914).
I. L. R. 36 All. 308

——— s. 48—*Mortgage—Prior and puisne incumbrancers—Tender of amount of prior mortgage by puisne incumbrancer—Offer by letter. Held,* that an offer by letter of the amount due on a mortgage is not a good tender within the meaning of s. 84 of the Transfer of Property Act. It is necessary that the money should be actually produced unless it can be shown that the person entitled to receive the money has waived this condition. *Kamaya Naik* v. *Devapa Rudra Naik, I. L. R. 22 Bom. 440,* referred to. CHETAN DAS *v.* GOBIND SARAN (1912) . . **I. L. R. 36 All. 139**

——— ss. 52, 56, 81.

See APPEAL . **I. L. R. 41 Calc. 418**

——— s. 53.

See DECREE, ASSIGNMENT OF.
I. L. R. 37 Mad. 227

——— s. 54.

See SALE . **I. L. R. 41 Calc. 148**

——— *Sale compulsorily registrable, to defendant by unregistered kobala—Part performance—Payment of purchase money and delivery of possession—Subsequent sale by registered kobala to plaintiff with notice of defendant's rights—Plaintiff if may recover—Equity—Specific performance—Registration Act (XVI of 1908), ss. 17 and 49.* Where a purchaser of immoveable property under an unregistered *kobala* paid Rs. 500, the agreed price, to his vendor and was placed in possession : *Held,* that in the absence of circumstances showing

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— **s. 54**—*contd.*

that such purchaser was not entitled to sue his vendor for specific performance, a subsequent purchaser of the property under a registered conveyance could not succeed in a suit to recover possession of the property from the former purchaser. The defendant is entitled, apart from the provisions of the Registration Act, to resist such a suit, and to permit such a defence to be taken does not amount to an invasion or evasion of the Registration Act. *Walsh* v. *Lonsdale, L. R. 21 Ch. D. 9*, followed. PUCHHA LAL *v.* KUNJ BEHARY LAL MONDAL (1913). . **18 C. W. N. 445**

——— **ss. 54 and 118**—*Usufructuary Mortgage —Oral arrangement that mortgagee should give up possession of the mortgaged property in part, and receive the equity of redemption in part—Sale or Exchange—"Price," meaning of—Evidence Act (I of 1872), s. 92—Adverse possession by mortgagee.* A usufructuary mortgagee of items *A* and *B* sued to redeem item *A*, alleging that item *B* had been previously redeemed by him. The defendant pleaded that more than 12 years prior to suit the mortgage had been extinguished by an oral arrangement by which the mortgagor orally sold item *A* to the mortgagee in consideration for the latter surrendering item *B* to the mortgagor freed from the mortgage lien. The defendant also contended that the possession of the mortgagee became adverse from the date of the arrangement, and that the suit was barred by limitation. *Per* CURIAM. *Held*, that the transaction pleaded was not merely a compromise in acknowledgment of existing right, but amounted to an exchange of property within s. 118 of the Transfer of Property Act if it was not a sale, and was invalid for want of a registered instrument. *Per* MILLER, *J.* The transaction could not be proved for showing the change of the mortgagee's possession into adverse possession, since the intention to discharge the mortgage involved the intention to make certain transfers, and it could not be said that if those transfers failed, both the parties nevertheless intended to discharge the mortgage. *Per* SADASIVA AYYAR, *J.* All transfers by conveyance, if they are not settlements or declarations of trust were intended by the Legislature to come within one of the headings 'sale,' 'exchange' or 'gift' in the Transfer of Property Act. *Thiruvengadachariar* v. *Ranganatha Aiyangar, 13 Mad. L. J. 500*, dissented from. Price means not only money in current coin, but includes money due on prior debt, and the words 'price paid' will cover cases where the vendor's claim to the receipt of the price is satisfied by giving him what he accepts as tantamount to such payment. A mortgagee in possession, as such, cannot by merely asserting possession as owner under an invalid sale convert his possession into adverse possession so as to prescribe for a title under the Limitation Act. *Byari* v. *Puttanna, I. L. R. 14 Mad. 30, Bhagvan Govind* v. *Kondi valad Mahadu, I. L. R. 14 Bom. 279, Ramunni v. Kerala Varma Valia Raja, I. L. R. 15 Mad. 166*, and *Khiarajmal* v. *Daim, I. L. R. 32 Calc. 296* applied. A mortgage created by a registered instrument may be proved to have been discharged by admissible evidence (including oral evidence) of payment of the mortgage amount, or by admissible evidence of any other transaction which operates as mode of payment. *Ramavatar* v. *Tulsi Prosad Singh, 14 C. L. J. 517, Kattika Bapanamma* v. *Kattika Kristnamma, I. L. R. 30 Mad. 231, Karampalli Unni Kurup* v. *Thekku Vittil Muthorakutti, I. L. R. 26 Mad. 195*, and *Gositi Subba Row* v. *Varigonda Narasimham, I. L. R. 27 Mad. 368*, referred to. But oral evidence of an invalid oral conveyance (of which evidence is legally inadmissible) of the equity of redemption in a portion of the mortgaged property in discharge of the mortgage debt is inadmissible. ARIYAPUTHIRA *v.* MUTHUKOMARASWAMI (1912). **I. L. R. 37 Mad. 423**

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— **s. 54**—*concld.*

——— **s. 55, Sub-s. (1), cl. (b).**

See SPECIFIC PERFORMANCE.

I. L. R. 41 Calc. 852

——— **ss. 58, 100**—*Construction of document— —Mortgage—Charge.* A deed commenced by reciting that the executant had borrowed a certain sum of money from certain persons, and then proceeded to refer to certain share in a property, and finally there was a clause by which the executant undertook that until repayment of the amount he would not transfer the property by sale, mortgage, gift or in any other way, but there was in no part of the document any expression conveying the idea of mortgage or hypothecation, nor was there any reference to any right of sale in the property. *Held*, by RICHARDS, *C.J.*, that it was the intention of the parties to make the property mentioned therein security for the loan and interest and that the document created a charge within the meaning of s. 100 of the Transfer of Property Act, 1882. But as there was no transfer of any interest, for the purposes of securing the loan, in the property mentioned in the deed, it was not a simple mortgage without the meaning of s. 58. *Per* BANERJI J. (*contra*). The intention was that the persons who had lent the money should have a right to realize their money from the property by causing it to be sold. The document was therefore a simple mortgage within the meaning of section 58 of the Transfer of Property Act. *Martin* v. *Pursram, N. W. P., H. C. 124*, referred to. JAWAHIR MAL *v.* INDOMATI (1914) . . **I. L. R. 36 All. 201**

——— **s. 59**—*Equitable mortgage—Deposit of title deeds of property situate in mofussil—Intention to create charge, proof of—Registration.* The plaintiff deposited with the defendant in Bombay title-deeds of his property situate at Nasik and borrowed a sum from the defendant. The defendant also at the same time executed in favour of the plaintiff a writing setting forth the clear intention of the defendant that the deposit of title-deeds should be security for the loan from the plaintiff

TRANSFER OF PROPERTY ACT (IV OF 1882) —*contd.*

——— **s. 59**—*concld.*

and binding the defendant to execute on demand a proper legal mortgage of the property covered by the title-deeds deposited. This writing, which was the only evidence available of the defendant's intentions in making the deposit of title-deeds, was not registered. *Held*, that the deed required registration as it created a charge upon the property ; that in its absence there was no evidence whatever of intention to connect the deposit of title-deeds with the debt ; and that the mere fact that there was a subsequent or contemporaneous loan was not sufficient in law to warrant a presumption apart from any other evidence that the contemporaneous or antecedent deposit of title-deeds was necessarily made as security for the loan. BEHRAM RASHID *v.* SORABJI RUSTOMJI (1913).

I. L. R. 38 Bom. 372

——— **s. 82**—*Mortgage—Contribution—Principle upon which contribution should be assessed—Civil Procedure Code (1908), Order XXI, rule 89.* Where a co-mortgage is suing the other co-mortgagors for contribution upon the allegation that the portion of the mortgaged property in which he is interested has been made to discharge more than its proper share of liability under the mortgage, the Court in assessing contribution has first to ascertain the values of the various items of property in question as they stood at the date of the mortgage : next the rateable liability of each item for the amount payable under the decree : next how much each item has contributed to the payment of the decretal amount, disregarding any purchase money which any of the purchasers has paid or retained, and it should then proceed to apportion the liability between the different items. BHAGWAN SINGH *v.* MAZHAR ALI KHAN, 1914).

I. L. R. 36 All. 272

——— **s. 85.**

See HINDU LAW—JOINT FAMILY.

I. L. R. 36 All. 383

——— **ss. 85 and 91**—*Mortgage suit—Parties—Non-joinder of attaching money-decree-holder—Sale, validity of.* Where after attachment by a money-decree-holder of certain property previously mortgaged by the judgment-debtor, the mortgagee brought a suit on the mortgage, without impleading the attaching decree-holder as a party, obtained a decree for sale, and himself bought the property in execution of his decree : *Held*, that the order for sale and the sale held thereunder were not binding on the attachment decree-holder, and that the latter was entitled to bring the properties to sale under his attachment. An attaching decree-holder has, under s. 91, Transfer of Property Act, an interest in the mortgaged property entitling him to redeem the mortgage, and is a necessary party in a suit on the mortgage. *Ghulam Hussain* v. *Dina Nath, I. L. R. 23 All. 467*, referred to. VENKATA SEETHARAMAYYA *v.* VENKATARAMAYYA (1912) . **I. L. R. 37 Mad. 418**

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— **ss. 85, 99.**

See MORTGAGE . **I. L. R. 41 Calc. 727**

——— **s. 89.**

See PRIVY COUNCIL.

I. L. R. 36 All. 350

——— **s. 99.**—*Civil Procedure Code (1908), Order XXXIV, rule 14—Hindu law—Joint Hindu family—Mortgage by father alone—Suit on mortgage, ending in money decree—Sale of mortgaged property in execution—Suit by sons for redemption.* One *N. S.*, the father and managing member of a joint Hindu family, executed a simple mortgage of joint family property in favour of *R.L. R.L.* brought a suit for sale on this mortgage against *N. S.* alone, not impleading his son, but in that suit he released the security and took a simple money-decree against *N. S.*, in execution of which he attached and brought to sale the mortgaged property and purchased it himself. The sons of *N. S.* neither objected to the passing of the decree against their father nor to the sale of the property, but subsequently filed a suit against *R.S.* for redemption of the mortgage. *Held*, that the mortgagee could not, by taking a simple money decree for his debt and bringing the property to sale in execution of such decree, divest himself of his character as a mortgagee, and that the sons of the mortgagor, not having been made parties to the original suit for sale, were still entitled to sue for redemption of the mortgage made by their father. *Mayan Pathuti* v. *Pakuran, I. L. R. 22 Mad. 347, Martand Balkrishna Bhat* v. *Dhondo Damodar Kulkarni, I. L. R. 22 Bom. 624, Pancham Lal Chaudhury* v. *Kishun Pershad Misser, 14 C. W. N. 579*, and *Khiarajmal* v. *Daim, I. L. R. 32 Calc. 296*, referred to. *Debi Singh* v. *Jia Ram, I. L. R. 25 All. 214, Tara Chand* v. *Imdad Husain, I. L. R. 18 All. 325, Parmanand* v. *Daulat Ram, I. L. R. 24 All. 549, Banh Bal* v. *Manni Lal, I. L. R. 27 All. 450, Muhammad Abdul Bashid Khan* v. *Dilsukh Rai, I. L. R. 27 All. 517, Kishan Lal* v. *Umrao Singh, I. L. R. 30 All. 146*, and *Muthu* v. *Karuppan, 17 Mad. L. J. 163*, distinguished, SARDAR SINGH *v.* RATAN LAL (1914) . . . **I. L. R. 36 All. 516**

——— **s. 101.**

See MORTGAGE . **I. L. R. 38 Bom. 24**

——— *Extinguishment of charge—Mortgagee having two charges—Purchase by mortgagee at the sale under the first mortgage—Second mortgage cannot be enforced.* *G* took a mortgage of certain lands in 1886. They were mortgaged to him again in 1894. In 1895, he sued on his first mortgage and obtained a decree. In execution of the decree the lands were sold subject to the mortgage of 1895 and purchased by *G* with the permission of the Court. In 1905, a partition took place between *G's* heirs, at which the certificate of sale went to the share of the defendant and the mortgage-deed of 1895 went to the share of the plaintiff. The plaintiff next sued the defendant

TRANSFER OF PROPERTY ACT (IV OF 1882) —*concld.*

———— **s. 101**—*concld.*

to enforce the mortgage against her : *Held*, that the plaintiff could not sue the defendant on the mortgage, for after what had occurred in 1895 *G* could have had no right to sue himself in a double capacity as mortgagee under the mortgage of 1894 and mortgagor under the sale-certificate of 1895, that is he could have had no cause of action against himself, and the plaintiff as his heir could have no higher rights. LAXMAN GANSEH *v.* MATHURABAI (1913) . **I. L. R. 38 Bom. 369**

———— **s. 107.**

See REGISTRATION ACT (XVI OF 1908) SS. 17, 90 . . **I. L. R. 36 All. 176**

———— **ss. 107, 116**—*Oral lease for a year, with delivery of possession—Renewal every year by annual oral leases—Leases, if valid —Non-delivery of possession—Holding over.* Where a lessee, to whom possession of the demised land was delivered under an oral lease for one year, continued to hold the land under successive oral leases each of one year's duration : *Held*, that even if these later leases be invalid on the ground of non-delivery of possession [*Sibendrapada* v. *Secretary of State, I. L. R. 34 Calc. 207*], there was a holding over by the lessee with the lessor's assent, within the meaning of s. 116 of the Transfer of Property Act. A series of successive leases each for one year is quite different from a lease from year to year. MITRAJIT MAHTON *v.* SHEIKH LEAKUT HOSAIN (1914). **18 C. W. N. 858**

———— **s. 108, cl. (h).**

See LAND REVENUE CODE (BOM. ACT V OF 1879), S. 83. **I. L. R. 38 Bom. 716**

———— **s. 130.**

See SUCCESSION ACT (X OF 1865), S. 190. **I. L. R. 38 Bom. 618**

———— **s. 132, illus.** (*i*).

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), SS. 268, 278, 283. **I. L. R. 38 Bom. 631**

———— **s. 137.**

See CONTRACT . **I. L. R. 41 Calc. 670**

See CONTRACT ACT (IX OF 1872), SS. 4, 61, 103 . **I. L. R. 38 Bom. 255**

TRANSFER OF SHARES.

See REGISTRATION. **I. L. R. 36 All. 365**

TREES.

See LAND REVENUE CODE (BOM. ACT V OF 1879), S. 83 . **I. L. R. 38 Bom. 716**

TRESPASSER.

See EJECTMENT **I. L. R. 37 Mad. 281**

See PUBLIC RELIGIOUS TRUST. **I. L. R. 41 Calc. 749**

TRIAL BY JURY.

See JURY, TRIAL BY.

TRUST.

See SUCCESSION ACT (X OF 1865), S. 190. **I. L. R. 38 Bom. 618**

———— *Deed of trust construction of—Scheme of Management—Superintendent, if cestui que trust—Trustees, power of dismissal by—Contract of service—Perpetual injunction—Specific Relief Act (I of 1877), ss. 21 (b) and 54.* A donor by an *arpannama*, or deed of trust, transferred certain property to trustees for religious and charitable uses. The deed provided, *inter alia*, that there should be a superintendent of the trust properties subject to the control of the trustees. It was further provided that the superintendent should be the " executive hand " of the trustees, should supervise the management of the properties, which were to be registered in his name, in the Collectorate, summon meetings of the trustees, and keep accounts and submit them to the trustees. The first superintendent was to be the donor himself and after his death or relinquishment of office the superintendent was to be appointed by the trustees. No express power of dismissal was given to the trustees by the deed : *Held*, that a superintendent appointed by the trustees under the foregoing power was not a *cestui que trust*, but was the servant of the trustees, and that if dismissed by them he had no right to an injunction restraining the trustees " from interfering with his enjoyment of the rights and privileges of such superintendent as in the deed of trust provided." *Dean* v. *Bennett, L. R. 6 Ch. App. 489, Wills* v. *Child 13 Beav. 117, Attorney-General* v. *Magdalen College, Oxford, 10 Beav. 402*, and *Whiston* v. *Dean and Chapter of Rochester, 7 Hare 532*, referred to. *Daugers v. Rivaz, 28 Beav. 233*, distinguished. The position of such a superintendent is not, analogous to that of a *shebait* or *mutwali*. *Nanabhai* v. *Shriman Goswami Girdhariji, I. L. R. 12 Bom. 331, Goswami Shri Gridharji* v. *Madhowdas Premji, I. L. R. 17 Bom. 600*, and *Gulam Hussain* v. *Ali Ajam, 4 Mad. H. C. 40*, referred to. *Held*, further, that the contract of service between the superintendent and the trustees was governed by s. 21 (*b*) of the Specific Relief Act, and an injunction should therefore not be granted in respect of it under s. 54. A power of appointment ordinarily involves a power of dismissal. RAM CHARAN BAJPAI *v.* RAKHAL DAS MOOKERJEE (1913). **I. L. R. 41 Calc. 19**

TRUSTEE.

See CIVIL PROCEDURE CODE (ACT V OF 1908) S. 92 **I. L. R. 37 Mad. 184**

———— **power of dismissal by—**

See TRUST . . **I. L. R. 41 Calc. 19**

TRUSTS ACT (II OF 1882).

———— **s. 5.**

See STAMP ACT (II OF 1899), SCH. I, ART. 22 . . **I. L. R. 38 Bom. 576**

U

UNANIMOUS VERDICT.

See CRIMINAL TRESPASS.
I. L. R. 41 Calc. 662

UNDUE ADVANTAGE.

See TEMPORARY INJUNCTION.
I. L. R. 41 Calc. 456

UNDUE INFLUENCE.

See PARDANASHIN LADY.
I. L. R. 36 All. 81

UNITED PROVINCES AND OUDH ACT.

——— **1899—III.**

See UNITED PROVINCES COURT OF WARDS ACT . .

——— **1900—I.**

See UNITED PROVINCES MUNICIPALITIES ACT . .

——— **1901—II.**

See AGRA TENANCY ACT.

——— **1901—III.**

See UNITED PROVINCES LAND REVENUE ACT . .

——— **1903—II.**

See BUNDELKHAND ALIENATION OF LAND ACT . .

UNITED PROVINCES COURT OF WARDS ACT (III OF 1899).

——— **s. 48.**—*Notice of suit—"Property of any ward"—Property attached in execution of a decree held by a ward. Held,* that the term "property of any ward" as used in s. 48 of the United Provinces Court of Wards Act, 1899, does not include property attached in execution of a decree held by a ward. No notice is, therefore, required of a suit brought by a person claiming title to such property for a declaration of his title. LAL SINGH *v.* THE COLLECTOR OF ETAH (1914).
I. L. R. 36 All. 331

UNITED PROVINCES LAND REVENUE ACT (III OF 1901).

——— **s. 32 (*d*).**—*Mahal—Land held revenue-free by Government not of necessity excluded from the mahal. Held,* (i) that s. 32, clause (*d*) of the United Provinces Land Revenue Act, 1901, shows that there may be in a mahal persons holding land revenue-free, and the land so held yet forms part of the mahal; and (ii) that a finding as to whether such land does or does not form part of the mahal is not a pure finding of fact but a mixed finding of fact and law. ABDUL RAHIM KHAN *v.* AHMAD KHAN (1914) . . . . **I. L. R. 36 All. 231**

UNITED PROVINCES MUNICIPALITIES ACT (I OF 1900).

——— **ss. 87, 152.**—*Municipal Board—Refusal of permission to re-erect a building—Remedy open to applicant special appeal not suit.* When a Municipal Board refuses permission to erect or re-erect a building, the proper way to contest such refusal is to appeal in the manner provided for by s. 152 of the United Provinces Municipalities Act, 1900. The applicant for permission cannot maintain a civil suit for an injunction to restrain the Board from interfering with the plaintiff's building. ABDUS SAMAD *v.* THE CHAIRMAN, MUNICIPAL BOARD, MEERUT (1914) . **I. L. R. 36 All. 329**

——— **s. 147.**—

1. ——— *Conviction for disobedience to notice—Continuing breach.* After a conviction under s. 147 of the United Provinces Municipalities Act, the person convicted cannot be permitted to challenge the correctness of that conviction as often as he is prosecuted for continued disobedience of the order of the Board. SITAL PRASAD *v.* THE MUNICIPAL BOARD OF CAWNPORE (1914).
I. L. R. 36 All. 430

2. ——— *Prosecution for disobedience to notice—Validity of notice to be considered.* Before anyone can be convicted of an offence under s. 147 of the United Provinces Municipalities Act, the Court must be satisfied that what he had disobeyed was a notice lawfully issued by the Board under the powers conferred upon it by the Act. EMPEROR *v.* PIARI LAL (1914).
I. L. R. 36 All. 185

——— **ss. 147 and 152.**—*Notice—Disobedience to lawfully issued notice—Competence of accused to challenge validity of notice. Held,* that s. 152 of the United Provinces Municipalities Act, 1900, does not prevent a person, who may be prosecuted for disobedience to a notice issued by a Municipal Board, from establishing the defence that the notice in question was not as a matter of fact the Board's notice, inasmuch as it was not signed by any one legally authorized to sign such notices on behalf of the Board. EMPEROR *v.* HAZARI LAL (1914).
I. L. R. 36 All. 227

UNIVERSITIES ACT (VIII OF 1904).

See UNIVERSITY LECTURERSHIP
I. L. R. 41 Calc. 518

UNIVERSITY LECTURERSHIP.

——— *Specific Relief Act (I of 1877), s. 45—Universities Act (VIII of 1904)—Appointments to Professorships and Lecturerships in the University of Calcutta—Provisional appointment—Sanction by Governor-General in Council—If remedy lies against refusal to sanction—Mandamus—University Regulations, Chap. XI, s. 12.* The five conditions laid down in the proviso to s. 45 of the Specific Relief Act are cumulative and all have to be fulfilled. The Senate of the University is only bound by its Resolutions. It cannot be held bound by representations, made by any individual officer,

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without the sanction or authority of the University. Where a person deals with a corporation whose rights are defined by statute, he must be deemed to have informed himself of those rights. In this case the Resolution of the Senate cannot be interpreted as having appointed the applicant without the sanction of the Governor-General, or even that it was intended to appoint him without such sanction. No legal right can be said to exist, because the petitioner had lectured the previous year. A rule cannot be granted to try the title to an appointment. Such title can only be tried in a properly constituted suit. The existence of a legal right is the foundation of every writ of *mandamus*. The principle underlying the jurisdiction in these cases is that the proceedings can confer no title not already existing, though they may affect the consummation of the relator's title, if he had one ; but it gives him none. Whether the sanction required under s. 12, Chapter XI of the University Regulations for the appointment of a University lecturer is *ultra vires* or not, cannot be determined in summary proceedings of this nature. The personal right referred to in s. 45 of the Specific Relief Act is not a right *in rem*, " such as every human being in civilized society possesses independently of any act of his own." The above dictum in *In re Rustom Jamshed Irani, 3 Bom. L. R. 653*, dissented from. He alone is a competent relator who has some interest other than that of the community at large in the question to be tried. *York & North Midland Railway Co. v. The Queen, 1 El. & B. 858*, and, *Ex parte Browning, In re Marks, L. R. 9 Ch. Ap. 583*, discussed. *In re* ABDUL RASUL (1913).

I. L. R. 41 Calc. 518

UNIVERSITY REGULATIONS.

———— **Chap. XI, s. 12.**

See UNIVERSITY LECTURERSHIP.

I. L. R. 41 Calc. 518

USUFRUCTUARY MORTGAGE.

See TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 54, 118.

I. L. R. 37 Mad 423

USURY.

See SONTHAL PARGANAS.

L. R. 41 I. A. 197

V

VACATION.

See LIMITATION

I. L. R. 38 Bom. 656.

VAKALATNAMA.

See CIVIL PROCEDURE CODE (1908), O. XLI, R. 10 . **I. L. R. 36 All. 46**

VALATDANA PATTA.

See CONTRACT ACT (IX OF 1872), S. 65.

I. L. R. 38 Bom. 249

VALUATION.

See MORTGAGE . **I. L. R. 37 Mad. 420**

———— **principle of—**

See LAND ACQUISITION.

I. L. R. 41 Calc. 967

VALUATION OF SUIT.

See COURT FEES ACT (VII of 1870), S. 7, cl. (IV) . **I. L. R. 36 All. 500**

See SUITS' VALUATION ACT.

VATAN.

See INAM LANDS.

I. L. R. 38 Bom. 272

VENDOR AND PURCHASER.

———— ———— *Conveyance by Executor—" All estate, right and title "—Interpretation of deed—Purchasers for value.* An executor, who had a beneficial interest in the testator's estate, joined with other beneficiaries in the sale and conveyance of a part of the estate to *bonâ fide* purchasers for value. The executor did not purport to convey in his capacity as executor, but the deed stated that all the estate, right and title of the vendors were conveyed : *Held*, that the deed conveyed the whole title vested in the executor, and that it was not porper to infer from the conduct of the parties and from indications in the deed that the intention was only to convey the beneficial interest, since that inference was contrary to the terms of the conveyance. BIRAJ NOPANI *v.* PURA SUNDARY DASSEE (1914) . . . **L. R. 41 I. A. 189**

VENUE.

See JURISDICTION . **I. L. R. 41 Calc. 305**

———— **transfer of, from one Court to another after decree—**

See JURISDICTION.

I. L. R. 37 Mad. 477

VERDICT OF JURY.

———— *Reference to High Court—Power to question the jury as to their reasons for the verdict—Grounds of reference—Mere disagreement with a verdict not perverse—Interference by High Court when the verdict is not in defiance of the probabilities of the case.* It is open to the Judge, when he disagrees with the verdict of the jury and intends to make a reference to the High Court, under s. 307 of the Criminal Procedure Code, to question the jury as to the reasons for their verdict. *Emperor* v. *Annada Charan Thakur, I. L. R. 36 Calc. 629*, referred to. It is not in every case of doubt, nor in every case in which a view different from that of the jury can be entertained on the evidence, that a reference under s. 307 of the Code is to be made to the High Court, but when the verdict is manifestly wrong. The High Court will

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not interfere under s. 307 in every case of doubt or in every case in which it may with propriety be said that the evidence would have warranted a different view. *Queen* v. *Sham Bagdi, 13 B. L. R. Ap. 19,* approved. The High Court refused to interfere where the facts, on a reasonable hypothesis, were not inconsistent with the innocence of the accused, and the verdict was not in defiance of the probabilities of the case. EMPEROR *v.* SWARNAMOYEE BISWAS (1913) . **I. L. R. 41 Calc. 621**

VERNACULAR GOVERNMENT GAZETTE.

See REVENUE SALE.
I. L. R. 41 Calc. 276

VESTED RIGHT.

See LIMITATION . **I. L. R. 41 Calc. 1125**

VILLAGE CHAUKIDARI ACT (BENG. VI OF 1870).

——— **ss. 58, 59, 60, 61.**

——— *Determination by a Commissioner under s. 61—Fraud—Review by subsequent Commissioner—Civil Suit.* An order by Commissioner appointed under s. 58 of the Village Chaukidari Act determining that certain lands are chaukidari chakran lands is final and conclusive. Such orders cannot be reviewed by a second Commissioner even if the previous order was fraudulently obtained. An order under s. 61 of the Village Chaukidari Act may be set aside on proof of fraud or of non-compliance with the provisions of the law, if at all, only in a regular suit by a Civil Court. SARADINDU NARAIN ROY *v.* BENODE BEHARY MOHATA (1913) . **18 C. W. N. 143**

VINCHUR COURT.

See SPECIAL APPEAL.
I. L. R. 38 Bom. 340

W

WAGERING.

——— **defence of—**

See PAKKI ADAT TRANSACTIONS.
I. L. R. 38 Bom. 204

WAGERING CONTRACT.

See Contract ACT (IX OF 1872), S. 30.
I. L. R. 36 All. 426

WAIVER.

See MAHOMEDAN LAW—PRE-EMPTION.
I. L. R. 41 Calc. 943

WAJIB-UL-ARZ.

See PRE-EMPTION.

WAKF.

See WAQF.

WAQF.

See MAHOMEDAN LAW—WAKF.

——— **suit for declaration of—**

See CIVIL PROCEDURE CODE (1908), S. 11.
I. L. R. 36 All. 424

WARNING OF FIRE.

See INSURANCE **I. L. R. 41 Calc. 581**

WARRANT CASE.

See SUMMARY TRIAL.
I. L. R. 41 Calc. 743

WATER.

——— **proprietary rights in—**

See MADRAS IRRIGATION CESS ACT (VII OF 1865). **I. L. R. 37 Mad. 322**

WATER RIGHTS.

See EASEMENTS. . **I. L. R. 37 Mad. 304**

WIDOW.

See HINDU LAW—ADOPTION.
I. L. R. 38 Bom. 724

See HINDU LAW—ALIENATION.
I. L. R. 41 Calc. 793

See HINDU LAW—WIDOW.

alienation by—

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I. L. R. 41 Calc. 793

See LIMITATION . **L. R. 41 I. A. 267**

——— **brother's, not an heir—**

See HINDU LAW—STRIDHAN.
I. L. R. 37 Mad. 293

——— **powers exercised by surviving—**

See HINDU LAW—IMPARTIBLE ESTATE.
I. L. R. 37 Mad. 199

WIDOWS.

——— **exclusion of—**

See BABUANA AND SOHAG GRANTS.
L. R. 41 I. A. 275

WIDOW'S ESTATE.

See HINDU LAW—STRIDHAN.
I. L. R. 41 Calc. 870

WIFE'S COSTS.

See DIVORCE. . **I. L. R. 41 Calc. 963**

WILL.

See EVIDENCE ACT (I OF 1872), SS. 40, 41, 42, 44. **I. L. R. 38 Bom. 427**

See EVIDENCE ACT (I OF 1872), S. 41.
I. L. R. 38 Bom. 309

See HINDU LAW—WILL.

See INAM LANDS.
I. L. R. 38 Bom. 272

See REGISTRATION .
I. L. R. 38 Bom. 227

WILL—*contd.*

——— **construction of**—

See CONSTRUCTION OF WILL.

See HINDU LAW—IMPARTIBLE ESTATE.
I. L. R. 37 Mad. 199

See WILL. . **18 C. W. N. 554**

1. ——— *Execution and attestation of will—Proof of genuineness of will—Status of attesting witnesses—Will, natural, reasonable and proper in its terms—Presumption of will being genuine—Grounds of suspicion not valid—Admission of additional evidence by appellate court—Civil Procedure Code (1882) s. 568.* In the case of a will reasonable, natural, and proper in its terms, it is not in accordance with sound rules of construction to apply to it those canons which demands a rigorous scrutiny of documents of which the opposite can be said, namely, that they are unnatural, unreasonable or tinged with impropriety. On the question whether a will made by a Hindu in which he left all his property, moveable and immoveable, after the death of his widow, to his sister's son (one of the appellants) to the entire exclusion of the respondent (a remote relation), was genuine, as held by the Subordinate Judge, or a forgery, as held by the Court of the Judicial Commissioner, there were concurrent finding of both courts that the testator had been for years at enmity and on the worst of terms with the respondent, but had regarded the appellant with affection and treated him as his son. The will was found to have been duly executed, and properly attested by respectable servants in the testator's house whom it was natural to employ for that purpose. *Held*, that the will was in very respect a natural one, and in accordance with the testator's feelings and tenor of life, and the presumptions of law were in favour of its being maintained. A comment by the Court of the Judicial Commissioner which regarded the will with suspicion, to the effect that " the witnesses might have been of a better class " had no force except upon something on a much higher level than mere suspicion, namely, proof which would thoroughly satisfy the mind of a Court that those persons had committed both forgery and perjury. *Chotey Narain Singh* v. *Ratan Koer, I. L. R. 22 Calc. 519 ; L. R. 22 I. A. 12*, per LORD WATSON, followed. Another ground of suspicion was " that the paper on which the will was written appeared to be old instead of fresh," which was supported by proof that paper was official paper in general use, together with evidence that some other people had been in the habit of having forms which they signed in blank, and forms were produced signed by people other than the testator, and with none of which he had any thing to do. *Held*, that such evidence was inadmissible as being not relevant to the case, and should not have been admitted. *Held*, further, that the course followed by the Court of the Judicial Commissioner during the hearing of the appeal in sending for and (purporting to act under s. 568 of the Civil Procedure Code, 1882) admitting additional evidence (proceedings of the Municipal Board at Lucknow) to discredit one of the witnesses on a particular point, without calling him and affording him an opportunity of making an explanation of the matter, and on the ground that his evidence appeared untrue on that point disbelieving all the rest of his testimony as to the will, was an improper procedure and not in accordance with s. 568 of the Code. Their Lordships declined to conclude, in the absence of his own evidence on the point, that the rest of his testimony, otherwise quite unimpeachable, was perjury. JAGRANI KUNWAR *v.* DURGA PRASAD (1913).
I. L. R. 36 All. 93

2. ——— *Construction of Codicil—Bequest creating a succession of life interests to illegitimate son and his issue (aulad)—Whether " aulad " includes illegitimate issue—Marriage of son by birth a Mahomedan to Hindu caste ladies—Intention of testator—Mahomedan brought up as orthodox Hindu.* The question in this appeal was as to the construction of a codicil to the will of the late Maharaja of Balrampur, who was a Hindu of the Chattri caste, by which he purported to make provision for *J.B.* his son by a Mahomedan mistress, who, as held by the Courts below, was by birth a Mahomedan. He afterwards, however, became as far as was possible a Hindu. The appellant (plaintiff) was the eldest son of *J.B.* by a Mahomedan woman, and the second, third and fourth respondents were his brothers, and there were concurrent findings of both Courts in India that there was no valid marriage between *J.B.* and their mother and that they were consequently illegitimate. The first respondent was the son of *J.B.* by a Hindu lady of the Chhattri caste with whom he had admittedly gone through a marriage according to the strict Hindu rites ; and when that lady died his father got him married to other lady of the same caste. On the death of *J.B.* in 1899 the first respondent obtained possession of the property in suit, and the appellant sued for it, the question being whether the appellant was an " issue " of *J.B.* within the meaning of the word " *aulad* " as used in the codicil, and as such entitled to inherit *J.B.'s* property. The first respondent contended that the appellant being illegitimate could not take under the terms of the codicil ; that *J.B.* had been a Hindu from his boyhood to his death, and that he (the first respondent) being the only son of the first Hindu marriage, which was a valid one, was the heir of his father, and, on the true construction of the codicil, entitled to the property in suit. By the codicil, dated the 15th of March, 1878, the testator, after reciting, that his son *J.B.* " being not born of Khas Mahal, was not capable of the *gaddinashini* and the proprietorship of the *riasat*," continued :—" But he also being born of my loins it is incumbent on me that such means be provided as would enable him and his issue (*aulad*) to support themselves well and with respect " . . . . . Accordingly the settlement is made as follows : " Rs. 4,000 per mensem, or Rs. 48,000 per annum," (the income

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derived from certain villages named) shall be continued to be paid by the proprietor of the *riasat*, the *locum tenens* of the *gaddinashin* for the time being, and that amount shall be paid to *J.B.* and his issue (*aulad*) for generation after generation so long as the family (*khandan*) of *J.B.* and his issue (*aulad*) remain in existence . . . (3) for his life-time *J.B.* has a right to spend their money, but after his death from among his issue (*aulad*) one person (*jisko haq pahunchta howe*), to whom the right may go, shall be considered proprietor of this maintenance allowance, without division, as a *rais*. The other issue of the family of *J.B.* shall be entitled to get food, raiment and other necessaries out of the monthly allowance. (4) When there remains no descendant of the family of *J.B.* at any time the monthly allowance of Rs. 4,000 will be resumed and remain in proprietary possession of the proprietor of the "*riasat* the *gaddinashin*." The Court of the Judicial Commissioner held that "*aulad primâ facie* meant legitimate issue, and dismissed the suit. *Held* (upholding the decision), that the case was not one where a gift is made by will of the *corpus* of a fund or a life interest in a fund to the "children" of the testator, or of another, as a class. There might be good reason in some such cases for holding that in India the word "children" include illegitimate children. But here a succession of life interests from generation to generation is intended to be set up, the successor, or "proprietor," in each instance being vested with an absolute control of the income subject only to the duty of maintaining the issue (*aulad*) of the family (*khandan*) of the first proprietor *J. B.* There was nothing on the face of the codicil to suggest that a meaning should be given to the word "*aulad*" different from its *primâ facie* meaning. To include illegitimate issue would bring into the line of succession not only the testator's illegitimate grand children, but their illegitimate issue from generation to generation. Such a construction would render condition No. 4 rather unnecessary and would also defeat the whole purpose and object of the testator in establishing the succession of life interests. Nor was there any reason for extending the meaning of the word "*khandan*" which ordinarily refers to the group of descendants who constitute the family of the proprietor, so as to include illegitimate offspring, who from the necessities of the case cannot share in the family life or its worship or ceremonials. *Held*, also, that the fair result of the evidence was that *J.B.* did his utmost to become an orthodox Hindu, and to pass as such in the society in which he lived, and that his father from boy's youth upwards aided and encouraged him in those efforts. The testator treated his marriages with the two Chattri ladies as lawful marriages and desire that others should so treat them, and consequently resolved to regard and treat the offspring of those unions as legitimate, and desired that they should be so treated and regarded by others ; and that it was in this frame of mind he made the testamentary disposition in dispute. Having regard to all the evidence

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in the case, and the provisions of the codicil itself the intention of the testator plainly was to treat the marriages of *J.B.* with the two women of the Chattri caste as valid marriages and the issue of those marriages as legitimate issue. SHER BAHADUR *v.* GANGA BAKHSH SINGH (1913).

I. L. R. 36 All. 101

3. ——— *Executor—Powers of executor in dealing with the estate of his testator.* One P. died, leaving a will by which he directed that certain legacies should be paid out of a fund of Rs. 10,000 invested in fixed deposit in the Delhi and London Bank. The Bank had during P.'s life-time advanced certain sums to his daughter on an undertaking by P. that he would stand surety for the loan. P. was also himself indebted to the Bank. *Held*, on suit by the legatees, that the executor of P.'s will was profectly justified, on being satisfied as to the fact of P.'s relations with the Bank above described, in permitting the Bank to realize from the fund in question both the amount of the loan to P.'s daughter and the amount of his own indebtedness. POCOCK *v.* THE DELHI AND LONDON BANK, LD., (1914).

I. L. R. 36 All. 217

4. ——— *Construction of will—Self-acquired property—Bequest dividing property between testator's two sons with giftover to survivor—Survivorship whether limited to survivorship during testator's life or extending to period after his death—Period of distribution—Hindu Law.* A Hindu resident of Surat in the Presidency of Bombay made a will dated 20th August 1899 by which after appointing his two sons "executors, heirs and owners" of the whole of his property (which was self-acquired) and directing them to divide and take equal shares in it with certain exceptions, gave each of them a half share of his estate not especially disposed of by the will. By caluse 9 he made the following bequest, "I have divided between and given to my two sons the whole of my property as mentioned above. But should either of these two sons die without having had (leaving) any male issue the survivor of the said two sons is duly to take the whole of the property appertaining to the share of the deceased son who may have (leave) no male issue (behind him) after undertaking (to defray) the expenses in connection with the maintenance of his widow and marriage of his ninor daughter. But under these circumstances the heirs of my deceased son, Surajlal, shall not get any right whatever." The testator died on 4th July 1901 leaving him surviving his two sons. The elder son died on 2nd January 1903 leaving a widow and a daughter. In a suit by the surviving son to enforce the provisions of clause 9 of the will, the High Court held that the period of distribution contemplated by the testator was the period of his death at which time half of his estate became vested in each of his sons absolutely, and that clause 9 should be read as if the survivorship there provided was limited to survivorship at the death of the testator. *Held*, (reversing that decision), that the words of clause 9 were not limited to

WILL—*contd.*

survivorship during the testator's life, but clearly pointed to survivorship whenever it should occur ; and that the surviving son was as such survivor entitled to the estate conveyed by the clause, subject to the obligation imposed upon him of maintaining his brother's widow and daughter CHUNILAL PARVATISHANKAR *v.* BAI SAMRATH (1914).

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5. ——— *"Will" in s. 19 of the Probate and Administration Act, if means original document—Existence of will up to testator's death, if necessary to be proved—Revocation, pleading and proof of—Presumption of destruction of will, when arises—Loss of will, if operates as revocation—Destruction of will when operates as revocation—S. 24—"Since the testator's death," scope and effect of —Delay in applying for Letters of Administration with will annexed.* Where the testator did not appoint an executor and the residuary legatee applied for letters of administration with the will annexed 12 years after the death of the testator and the objector did not plead revocation but set up non-execution of the will : *Held*, that the execution of the will in the manner required by law having been proved it lay upon the objector to plead and prove revocation and no such plea having been taken it could not be held that the will was revoked. *Per* RAY *J.* That the application for letters of administration was not liable to dismissal on the ground that the petitioner did not prove that the will was in exixtence up to the time of the testator's death. That in s. 19 of the Probate and Administration Act the word " will " does not mean the original document but has been obviously used to mean the disposition. When a will is shown to have been in the custody of the testator and is not found at his death the well-known presumption arises that the will has been destroyed by the testator for the purpose of revoking it. This rule of law bears only on revocation when it is an issue in the suit and then the presumption may be rebutted by the facts. The loss of a will does not operate as revocation to establish which destruction of the will by the testator must be shown. In s. 24 of the Probate and Administration Act the words " since the testator's death " qualify the word " mislaid " and have no reference to the word " lost " or to the succeeding clause of the sentence. The delay in making the application under s. 19 was not a material fact in this case. SARAT CHANDRA BASAK *v.* GOLAP SUNDARI DASYA (1913).

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6. ——— *Will by Hindu—Interpretation, fundamental principles of, common to Hindu and English wills—Court's duty to give effect to intention as expressed, not to add to will—Surrounding circumstances to be looked at as aid to interpretation only—Religious opinion and race, in what way relevant—"Liberal construction of native wills," meaning of Contemporaneous deed, referred to in will and interpretation by persons interested if may be referred to—English rules of construction, if inapplicable.* In construing a will, a Court must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense and many other things including the race and religious opinions of the testator and influences and aims arising therefrom—but all this solely as an aid to ascertaining the meaning of the language used by the particular testator in the particular will. Once the right construction is settled, the duty of the Court is loyally to carry out the intentions as expressed and none other. This duty is universal, and is true alike of wills of every nationality and every religion or rank of life. The Court is in no case justified in adding to testamentary dispositions. If they transgress any legal restrictions they must be disregarded. If any eventuality arises which the will leaves unprovided for, there will be intestacy. This fundamental principle does not clash with the principle that the Court will not necessarily apply English rules of construction to a will of a Hindu like the present, nor does it clash in any way with what is sometimes called " giving liberal interpretation to native wills." That native testators should be ignorant of the legal phrases proper to express their intentions or of the legal steps necessary to carry them into effect, is one of the most important of the " surrounding circumstances " which the Court must bear in mind, and it is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions. But those intentions must be ascertained by the proper construction of the words he uses, and once ascertained, they must not be departed from. It is legitimate in construing a will to look at contemporaneous document referred to in the will which the testator wrote or caused to be written with the express intent to render clear his wishes with regard to his succession. The interpretation placed on the power by the testator's widows was referred to " for what it was worth." NARASIMHA APPA ROW *v.* PARTHASARATHY APPA ROW (1913).

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7. ——— *Construction—Life estate to daughter—Bequest to daughter's sons—On failure of the bequest the estate to go to the testator's cousins absolutely—No son born to the daughter at the death of the testator—Failure of the bequest to daughter's son —Not a case of intestacy—Operation of the bequest in favour of the testator's cousins—The intention of the testator to retain his estate in his own family, that is, in the hands of his cousins.* A testator in his will provided, *inter alia*, that his daughter should have a life estate of Rs. 150 and the rent of a house and in the event of her having a male child or male children, he or they should take the whole estate of the testator on attaining the age of 18 and then bearing a good character. Should the daughter have no male issue, then on her death, the whole of the testator's estate was to go to his cousins absolutely. The daughter having borne no male issue during the life-time of

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the testator, the intended bequest to her male issue failed : *Ganendra Mohan Tagore* v. *Jatindra Mohan Tagore, 9 B. L. R. 377.* A question having arisen as to whether the condition of the daughter having a son (at the death of the testator) not being fulfilled, there was a case of intestacy. *Held*, that there was no intestacy. The intention of the testator was to give the whole of his property to his grandson (draughter's son). That intention having failed, the dominant intention of the testator was, subject to his daughters life estate, to retain the estate in his own family, that is to say, in the hands of his cousins. NARANDAS VRIJBHUKHANDAS *v.* BAI SARASWATIBAI (1914). **I. L. R. 38 Bom. 697**

8. _____ *Will of which probate has not been taken, whether can be proved—Succession Act (X of 1865), s. 187—Proper representation of testator's estate, where no probate taken. Sarbamongola Debi* v. *Mahendro Nath Nath, I. L. R. 4 Calc. 509*, is authority for holding that a will of which probate has not been taken may be proved in a proceeding other than a proceeding under the Probate Act. But a will uncovered by a probate or letters of administration cannot prove that anybody named therein has title to the estate of the testator. A legal heir of a testator in possession of his general estate can maintain a suit for the benefit of the estate so long as any other claimant does not establish his right to the same under the will. *Prosunno Chandra Bhattacharya* v. *Krista Chaitanya Pal, I. L. R. 4 Calc. 342, Choony Lal Bose* v. *Osmond Bibee, I. L. R. 30 Calc. 1044*, referred to. BASUNTA KUMAR CHUCKERBUTTY *v.* GOPAL CHUNDER DAS (1914). **18 C. W. N. 1136**

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_____ "aulad"—

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See CRIMINAL PROCEDURE CODE, S. 54 (*1*). **I. L. R. 36 All. 6**

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———— **" stating the grounds of its opinion"**

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———— **" tried again "**—

See AUTREFOIS ACQUIT. **I. L. R. 41 Calc. 1072**

———— **" unable "**—

See GUJRAT TALUKDARS' ACT (BOMBAY ACT VI OF 1888 AS AMENDED BY BOMBAY ACT II OF 1905), ss. 29, 29B (*1*), (*2*), (*3*) AND 29E . **I. L. R. 38 Bom. 604**

WORKMEN'S BREACH OF CONTRACT ACT (XIII OF 1859).

———— **s. 2,** *order under—Right of appeal from the order—Proper orders to be made under s. 2.* No appeal lies to the Sessions Court from the order of the Magistrate under s. 2 of Act XIII of 1859.

WORKMEN'S BREACH OF CONTRACT ACT (XIII OF 1859)—*concld.*

———— **s. 2**—*concld*

The Magistrate, while making an order under s. 2 of Act XIII of 1859, cannot make an order of imprisonment in default, but such an order could be made after there has been non-compliance with the order of re-payment or carrying out the contract. ANUKUL CHANDRA ROY *v.* KAMAR ALI SIRDAR (1913) . . . **18C. W. N. 1271**

WORSHIP OF IMAGE.

See HINDU LAW—ENDOWMENT. **I. L. R. 41 Calc. 57**

Z

ZAMINDARI SALE.

———— **in execution**—

———— *Whether entire zamindari or only zamindar's life estates sold—Mixed question of law and fact depending on entire evidence in the case—State of then law as to the zamindar's interest therein, not conslusive—Conduct of parties, important evidence.* A question as to whether the entire estate in a zamindari and not only the life interst of the zamindari was sold in execution and brought by the purchaser is a question of mixed law and fact to be determined by the evidence in each case. All that *Abdul Aziz Khan* v. *Appayasami Naicker, I. L. R. 27 Mad. 131, 142,* decided in reference to the above question was that the state of the law as understood at the time of sale, as to the rights of the zamindar in regard to the zamindari, was evidence to be considered along with other evidence in the case ; it is not alone conclusive on the question. In determining the question of what the Court intended to sell and the purchaser understood he bought, evidence as to how the parties affected by the transaction themselves viewed it at the time is of much greater value than evidence which may be procurable some twenty years after the transaction took place. On the evidence in the case, their Lordships held that the sale which took place in 1880 was of the whole zamindari and that the purchaser bought the whole zamindari in execution. *Veerabhadra Aiyar* v. *Marudaga Nachiar, I. L. R. 34 Mad. 188,* referred to. *Veera Soorappa Nayani* v. *Errappa Naidu, I. L. R. 29 Mad. 484, 490,* explained. ALAGARAYA GOUNDER *v.* RAMANUJA NAIDU (1911). **I. L. R. 37 Mad. 22**

ZAMINDARS AND RAJAS.

———— **rights of, waters of rivers passing through their lands**—

See MADRAS IRRIGATION CESS ACT (VII OF 1865) **I. L. R. 37 Mad. 322**

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